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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted]riginal [redacted] 9 B 91 8 5

STATE OF NEW JERSEY,

Plaintiff,

vs.

STATE OF NEW YORK and CITY OF NEW YORK,

Defendant.

Hearing on Bill and Answer.

BRIEF FOR PLAINTIFF.

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INDEX

		Page
I.	STATEMENT OF CASE	1
	Summary of Allegations	2
	Synopsis of Complaint and Answer	3
	Consolidated Complaint and Answer	8
	Jurisdiction	8
II.	SUMMARY OF THE ARGUMENT	8
	(1) Defendant cannot erect said dams or divert said waters without the affirmative authority of Congress, and the approval of plans by the Chief of Engineers and the Secretary of War	9
	(2) Defendant cannot divert said waters without the consent of plaintiff	9
	(3) The diversion of said waters violates the common law rights of plaintiff and its citizens as riparian owners below the point of diversion	9
	Rules of Pleading applicable to this motion	9
	Appendices	10
III.	ARGUMENT	11
	(1) Defendant cannot erect said dams or divert said waters without the affirmative authority of Congress and the approval of plans by the Chief of Engineers and the Secretary of War	11
	Facts pertaining to point (1)	11
	Navigability of Delaware River	12
	Navigability below Trenton	13
	Navigability above Trenton	13
	Colonial Navigation	13
	Laws of New Jersey	14
	Laws of Pennsylvania	15
	Laws of New York	16
	Action of Federal Government	16
	Necessity for federal authority and approval	20
	Necessity for injunction	29

PAGE

(2) Defendant cannot divert said waters without the consent of plaintiff 30
Facts pertaining to point (2) 30
Validity of alleged agreement 31
Other sources of supply 34
Reciprocal rights 35
Necessity 37
(3) The diversion of said waters violates the common law rights of plaintiff and its citizens as riparian owners below the point of diversion 40
Facts under point (3) 40
The common law 41
The common law in New Jersey 44
Common law in New York 47
The validity of riparian rights 49
Eminent domain 50
Flood waters 57
Adequate remedy at law 57
Interstate common law 58
Decisions of this court on the diversion of interstate waters 59

IV. CONCLUSION 70

Cases Cited.

PAGE

A

Acker *v.* Town of Newcastle, 48 Hun. (N. Y.) 312 57
Acquackanonk Water Co. *v.* Watson, 29 N. J. E. 366 53
Arnold *v.* Mundy, 6 N. J. L. 1 ..... 45, 47
Attorney-General *v.* Delaware and Bound Brook R. R. Co., 27 N. J. E. 1 ..... 45, 47

B

Boqm Co. *v.* Patterson, 98 U. S. 403, 406 51

C

Canal Fund Commissioners *v.* Kempshall, 26 Wend. 404 48
City of New York *v.* Blum, 208 N. Y. 237 48
Clark *v.* Rochester, 43 Hun. (N. Y.) 271 57
Crooked Lake Navigation Co. *v.* Keuka Nav. Co., 4 N. Y. 380 48

D

Doremus *v.* City of Paterson, 65 N. J. E. 711 47

E

Economy Light & Power Co. *v.* U. S., 256 U. S. 113 ..... 24, 37

F

Farrell *v.* Richards, 30 N. J. E. 511 47
Ford & Son *v.* Little Falls Fibre Co., No. 47, Oct. Term, 1929, U. S. S. C. (Decided Jan. 6, 1930) 28, 49
Fulton County Gas & Electric Co. *v.* Rockwood Mfg. Co., Inc., 238 N. Y. 109 48

G

Garwood *v.* N. Y. C. R. R. Co., 83 N. Y. 400 52
Gough *v.* Bell, 21 N. J. L. 156; 22 N. J. L. 441; 23 N. J. L. 624 45
Gray, Attorney-General *v.* City of Paterson, 60 N. J. E. 385 47
Griffin *v.* Augusta R. Co., 72 Ga. 423 10

PAGE

H

Hanley *v.* Donoghue, 116 U. S. 157 12
Hine *v.* Trevor, 4 Wall. 555 20
Higgins *v.* Flemington Water Co., 36 N. J. E. 583 53
Holsman *v.* Boiling Springs Bleaching Co., 14 N. J. E. 335 .. 47
Hubbard *v.* Fort, 188 Fed. Rep. 987, 997 ..... 22, 23

I

Illinois Cen. R. R. Co. *v.* Illinois, 146 U. S. 387 44

J

Jackson *v.* U. S., 230 U. S. 1, 5, 18 12

K

Kansas *v.* Colorado, 206 U. S. 46 ..... 8, 28, 31, 32, 35, 36, 39, 40, 59

L

Louisville N. R. Co. *v.* Palmes, 109 U. S. 244 10

M

Manville Co. *v.* City of Worcester, 138 Mass. 89 56
Morgan *v*, King, 30 Barb. 9 48

O

O'Connell *v.* E. Tenn. V. & G. R. R. Co., 87 Ga. 346 57
Octoraro Water Co.'s Petition, 15 Pa. Dist. Rep. 767 55
Oklahoma *v.* Texas, 258 U. S. 584, 586 19

P

Parry *v.* Citizens Water Works Co., 37 N. Y. St. 715 52
Pine *v.* Mayor of N. Y., 112 Fed. 98; 185 U. S. 93 ..... 29, 52

R

Renaud *v.* Abbott, 116 U. S. 277 12
Rutz *v.* City of St. Louis, 7 Fed. Rep. 438 56

PAGE

S

St. Anthony Falls W. P. Co. *v.* St. Paul Water Commissioners, 168 U. S. 349 44
Sanitary Dist. of Chicago *v.* U. S., 266 U. S. 405, 424 34
Saunders *v.* Bluefield Water Works & Imp. Co., 58 Fed. Rep. 133 56
Shively *v.* Bowley, 152 U. S. 1 44
Shobel *v.* Kerr Salt Co., 164 N. Y. 303, 320, 321 48
Smith *v.* City of Rochester, 92 N. Y. 463 ..... 48, 53
Soc. for E. U. M. *v.* Morris Canal Co., 1 N. J. E. 157 47
Standen *v.* New Rochelle Water Co., 36 N. Y. Supp. 92 52
Stanford Water Co. *v.* Stanley, 39 Hun. (N. Y.) 424 53
State *v.* Jersey City, 25 N. J. L. 525, 529 45
State Bd. of Health *v.* Phillipsburg, 83 N. J. E. 402, 415 47
Stevens *v.* Paterson, etc. R. Co., 34 N. J. L. 532 45

T

The Montello, 20 Wall. 430 20
The Magnolia, 20 How. 296 19
The Propeller Genesee Chief, 12 How. 443 19
Thornton *v.* U. S., 271 U. S. 414 12

U

United Paper Board Co. *v.* Iroquois Pulp & Paper Co., 226 N. Y. 38 48
U. S. *v.* Bellingham Bay Boom Co., 176 U. S. 211 22
U. S. *v.* Rio Grande Dam & Irrigation Co., 174 U. S. 690, 20, 23, 49, 57

V

Van Etten *v.* City of New York, 226 N. Y. 483 48

W

Wisconsin *v.* Illinois, 278 U. S. 367 ..... 8, 24, 29, 34, 37, 39, 64
Wooster *v.* Gt. Falls Mfg. Co., 39 Me. 246 56
Wyoming *v.* Colorado, 259 U. S. 419 ..... 8, 32, 35, 36, 62

PAGE

Constitutions Cited.

United States—
Art. I, Sec. X, par. 3 ..... 31, 40
par. 2 32
10th Amendment 33
14th Amendment 38, 57

New Jersey—
Art. XXII (July 2, 1776) 44
Art. X, par. 1 (June 29, 1844) 45
Art. I, Sec. 16 51

New York—
Art. I, Sec. 16 ..... 47, 51

Federal Statutes Cited.

Stat. at L. 1925, Ch. 467, p. 1186 13
River & Harbor Act, Appr. Sept. 22, 1922 18
River & Harbor Act, Appr. Mar. 3, 1899, 30 St. L. 115, C. 425 ..... 20, 22
U. S. C. A. Title 33, Sec. 401 (p. 377) 20, 22, 30, 70
Sec. 403 (p. 397) 20, 22, 30, 71
Act. Sept. 19, 1890, 26 St. L. 454, Sec. 10 22
Sec. 7 22

State Statutes Cited.

New Jersey Acts—
May 27, 1783 (R. S. 1846, p. 3) 14
Nov. 28, 1808 (R. S. 1846, p. 480) 14
Feb. 9, 1815 (R. S. 1846, p. 546) 14
Mar. 1, 1820 (R. S. 1846, p. 547) 14
Dec. 5, 1823 15
Dec. 2, 1831 15
Feb. 26, 1834 15
Mar. 1, 1851 15
Feb. 16, 1831 (P. L. 1831, p. 131) 15

	PAGE
Pennsylvania Acts—	
Mar. 9, 1771	15
Sept. 28, 1789	15
Mar. 13, 1817 (6 Pa. L., p. 422)	16
Apr. 9, 1827 (Pa. L. 1827, p. 196)	16
Feb. 8, 1883	16
Apr. 4, 1886 (Pa. L. 1866, p. 436)	16
New York Acts—	
Apr. 16, 1816	16
Mar. 28, 1817	16
Apr. 12, 1822	16
Real Prop. Law, Ch. 50, Sec. 2 N. Y. Consol. L.	48

Public Documents.

House Document, No. 228 (68th Congr., 1st Ses.)	13
Atlantic Coast Pilot, Supplement to, Atlantic Coast (p. 72)	13
House Executive Document No. 1, Part 2, Volume II, 43rd Congress, 1st Session (Annual Report of Chief of Engineers 1873, p. 902)	17
Senate Executive Document No. 30, 48th Congress, 1st Session (Dec. 23, 1883)	17
Annual Report of Chief of Engineers, 1884, pp. 855, 857	17
House Document No. 226, 65th Congress, 1st Session	18
Report dated February 21, 1924 of Chief of Engineers	18

Histories.

Smith's History of New Jersey	14

Text Books.

Blackstone's Commentaries, Introduction (p. 68)	58
Vol. II, p. 18	41
1 Sharswood's, pp. 403, 404	42
Daniel's Ch'y Pl. & Pr. (Am. Ed.), Vol. 1, pp. 566, 568, 569	10
Encyclopedia of Pl. & Pr., Vol 1, pp. 873, 875	9
Vol. 6, pp. 396, 398	10
Farnham on Water & Water Rights, Vol. 1, par. 30	56

	Page
Hale's "De Jure Maris" (History & Law of the Foreshore & Sea Shore, Moore & Hall, 3rd Ed., p. 370)	41
Kent's Commentaries, Vol. 1, pp. 471, 472	59
Vol. 2, pp. 338, 339, 340	33
Vol. 3, pp. 427, 429	44
Lewis "Eminent Domain" (2nd Ed.), Sec. 237	51
Sec. 238	51
Sec. 1	51
Sec. 3	51
Sec. 61	51, 52
Sec. 61a	52
Sec. 61b	52
Sec. 62	53
Sec. 251	53
Moore's International Law Digest, Vol. 1, p. 653	50
Stephens on Pleading, p. 143	10
Olson, "The Colorado River Compact" (p. 51)	39

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 17, Original.

STATE OF NEW JERSEY, *Plaintiff,* *vs.* STATE OF NEW YORK and CITY OF NEW YORK, *Defendant.*	*On Bill and Answer.*

BRIEF FOR PLAINTIFF.

I.

Statement of the Case.

This matter is before the court for hearing upon complaint and amended answer of the defendant, City of New York (hereinafter referred to as "defendant"), on a motion for injunction.

This is an original action to restrain the diversion of waters from an interstate stream. The State of New York was made party defendant because, at the time the bill was filed, it had not given its approval of the plans of the City of New York for such diversion. The amended answer of the City of New York shows that such approval has since been given (A. par. 28, p. 16). There is therefore now no relief which plaintiff can obtain against the State of New York. This motion proceeds against the defendant, City of New York, alone.

Summary of the Allegations.

The complaint alleges that the defendant intends to construct dams for impounding, diversion from the Delaware River watershed to the Hudson River watershed, and use, for water power, and potable purposes in New York City, the water from five tributaries of the Delaware River in the State of New York, as follows:

Stream	Dam to be Erected At	Watershed Area In Square Miles	Amount of Diversion in Millon Gallons Per Day
Neversink	Curry	70	70
East Branch	Downsville	370	370
Beaver Kill	Beaver Kill	60	60
Willowemoc	Parkston	60	60
Little Delaware	Delhi	50	40
Total		610	600

(C. par. 19, p. 12), and that by reason thereof permanent and irreparable injury will result to plaintiff and its citizens in several particulars enumerated therein, and that the proposed dams and diversion will violate the commerce and due process clauses of the Constitution of the United States (C. par. 48 and 49, pp. 24 and 25) and the Federal Water Power Act (C. par. 47, p. 24); will constitute an obstruction to and affect the navigable capacity of Delaware River, without the affirmative authority of Congress (C. par. 46, p. 24); will deprive plaintiff and its citizens as riparian owners along Delaware River of the natural unobstructed and undiminished flow of the waters of said river in violation of their rights under the common law as adopted and applicable in New York and New Jersey (C. par. 50, p. 25); will violate the Constitution of the United States by creating a preference to the ports of one state over those of another (C. par. 54, p. 26); will deprive the plaintiff and its citizens of the natural advantages of their location (C. par. 56, p. 26) and will divert

the waters of Delaware River from one watershed to another outside of the State of New Jersey (C. par. 55, p. 26).

Synopsis of Complaint and Answer.

The complaint alleges (C. par. 5, p. 7) that Delaware river is an interstate stream rising in New York State and constitutes the boundary between Pennsylvania and New York from a point near Deposit, to Tri-state Rock, near Port Jervis, New York; that southerly therefrom to a point near Chester, Pennsylvania, it constitutes the boundary between Pennsylvania and New Jersey (Exhibit "A" annexed to complaint). This allegation is admitted in the answer (A. par. 21, p. 18). The complaint alleges (C. par. 7, p. 8) that Delaware river has certain tributaries above enumerated in New York State draining an area, above the location of the proposed dams, of 610 square miles in the Delaware watershed. This is admitted in the answer (A. par. 5, p. 7).

The complaint alleges (C. par. 8, p. 8) that Delaware river has been historically and still is navigable and navigated for the transportation of passengers and freight and for the pursuits of fishing, hunting and pleasure; that from Deposit, New York, southward to its mouth, a distance of 245 miles, said river is navigable during bank full and high-water stages for the transportation of farm and forest products from the entire Delaware river valley to certain cities in New Jersey and Pennsylvania therein mentioned; that (C. par. 9, p. 8) between the mouth of the river and Trenton, a distance of 70 miles, said river is a tidal stream and is navigable in fact and at common-law and now carries interstate and foreign commerce in quantities therein mentioned; that said river is an inland waterway necessary to the common defense of the nation in times of war. The answer denies these allegations, except that it admits that said river is a tidal stream

navigable "for vessels of small draft," from its mouth to Trenton, and may in time of war be an inland waterway necessary for the common defense (A. pars. 6, 7, 8 & 9, pp. 7 and 8) and that, in other sections, it is used for the pursuits of fishing, hunting and pleasure (A. par. 6, p. 7).

The complaint alleges (C. par. 10, p. 9) that the tidal section has a project depth of 12 feet and that pursuant to recommendations made by the Secretary of War and the Chief of Engineers in House Document No. 228 (68th Congress, first session), Congress has appropriated money to deepen said channel to a project depth of 20 feet and that the proposed diversion of water by defendant will reduce the water level at Trenton to the extent of ½ foot or more; that the proposed diversion will reduce the water levels of the river above Trenton from 4 to 8 inches and at times more (C. par. 12, p. 9); that (C. par. 13, p. 9) between the Atlantic Ocean and the City of Trenton the bed of the bay and river, from the center of the channel thereof to high-water mark on the New Jersey side is owned in fee simple by the plaintiff; that from Trenton northerly to the northern boundary of the state the bed of the stream between the center of the channel thereof and the New Jersey shore is owned by the plaintiff and its citizens, who are the riparian proprietors, subject to the easements of the public for navigation on the river; that (C. par. 14, p. 10) the plaintiff is riparian proprietor of certain lands on the river at Trenton and (C. par. 15, p. 10), at Washington's Crossing, in Ewing Township, Mercer County, used for the State Capitol grounds and for recreation and park purposes; that (C. par. 17, p. 10) certain municipalities therein mentioned are located on the shores of the Delaware river and rely chiefly thereon for their economic and commercial prosperity; that (C. par. 18, p. 11) the City of Trenton obtains its water supply from the river; that (C. par. 22, p. 13) the defendant proposes to divert 25% of the available run-off of the Dela-

ware river originating in New York which will reduce the average flow of the river within the State of New Jersey at least 16%; that (C. par. 23, p. 14) such diversion will deprive the citizens of the plaintiff of waters to which they are entitled; that (C. pars. 25 and 26, pp. 15, 16, 17) such diversion will injure the oyster industry of the plaintiff and its fishing industry (C. par. 27, p. 17); that the proposed diversion will deprive the river of oxygen and purification necessary to overcome certain elements of pollution therein (C. pars. 29 and 30, p. 18) and will injure and destroy the river for the purposes of pleasure and recreation at Delaware Water Gap and other summer resorts thereon (C. pars. 31, 32, p. 19), and will destroy the possibility of the development of the river by dams and locks for slack water navigation and water power (C. pars. 33 and 34, p. 19); that the common-law rule of the rights of riparian owners has been adopted and applied in both the States of New Jersey and New York and that said diversion of water will deprive the plaintiff and its citizens, as riparian proprietors, of vested property rights (C. par. 16, p. 10).

Defendant denies these allegations and says that it proposes to take only the flood waters of the tributaries in question, which are not property, (A. par. 22, p. 13), and that what it proposes to do will benefit the river for the purpose of common defense (A. par. 7, p. 7), navigation (A. par. 8, p. 8), and water supply (A. par. 11 p. 9). It denies the allegation of the common-law rights of riparian proprietors (A. par. 10, p. 9; par. 39, p. 24) and declares its adherence to what it terms the principle of basic and reciprocal rights of the adjacent states to an equitable apportionment of the waters of the streams in question (C. par. 29, p. 17; par. 40, p. 26).

Complainant alleges (C. pars. 36, 37, 38, 39, pp. 20 and 21) that there is no public necessity for the proposed diversion because the defendant has investigated and found

available from the sources named in the complaint sufficient water within the State of New York which can be taken without diversion from its natural watershed and without injury to sister states, to supply its demands for the next 50 years. The answer denies these allegations except that it admits that defendant has made investigations of sources of supply as alleged (A. par. 15, p. 10).

The complaint alleges (C. par. 53, p. 25) that the defendant seeks to impose upon the plaintiff arbitrarily and against its will the division and apportionment of waters of Delaware river and its tributaries, which cannot be lawfully done except by voluntary compact between the parties, and approved by Congress. The answer asserts the right of the defendant to erect the proposed dams and make the proposed diversion of water under authority of the laws of the State of New York and of the United States, and that such right is within the sovereign and territorial rights of the State of New York (A. par 21, p. 12; par. 33, p. 21), and the approval of the Water Power and Control Commission of the State of New York (A. par. 29, p. 16).

The answer alleges that by virtue of the authority of the State of New York it will "at the earliest possible date complete plans and appropriate such funds as may be necessary for preliminary and construction work and proceed with all possible diligence to provide reservoirs, tunnels and aqueducts for its proposed new water supply to be derived in part from the tributaries of the Delaware River mentioned in said paragraph or section (C. par. 19, p. 12) of the bill of complaint" (A. par. 13, p. 9; par. 31, p. 18); and that defendant "is therefore in position to at once proceed with the development of this much needed project * * *" (A. par. 29, p. 16) and that owing to the insufficiency of its present water supply this "provision for the future must immediately be made" (A. par. 25, p. 14) and that "this defendant is therefore in posi-

tion to at once proceed with the development of this much needed project and the enlargement of its water supply" (A. par. 28, p. 16); and defendant alleges that the reason for building said dams and taking said water is the growth of the population of the City of New York and the necessity for additional water supply (A. par. 25, p. 14; par. 26, p. 15; par. 36, p. 23; par. 40, p. 26); that the water proposed to be diverted is to be used by defendant, also for water power (A. par. 17, p. 11). The answer alleges that the five tributaries in which it proposes to erect dams for the impounding and diversion of water are "non-navigable and wholly intrastate streams" (A. par. 21, p. 12).

Defendant alleges that it "now plans to use only 600 million gallons daily of this great volume of water which now merely goes to waste." Its plan "consists in providing five great reservoirs in which are to be stored the flood waters which come into being within the State of New York upon an area of 610 square miles of the southern slopes of the Catskill Mountains" (A. par. 31, p. 18).

Defendant alleges that the amount of water it proposes to take is an inconsequential part of the whole; would otherwise go to waste, and would be of no practicable use or benefit to any one; that said dams would conserve flood waters by storing them in reservoirs and letting them down in limited quantities during summer months in such a manner as to augment the dry period flow (A. par. 31, pp. 18, 19, 20); and that by increasing the flow in dry times and reducing the flow in flood times improvements will result to navigation, water power development, sanitation, water supply, flood conditions, fishing, recreation, pleasure, oyster industry and every other industry along the entire river valley (A. par. 22, pp. 20, 21; par. 39, p. 25).

Defendant admits its intention to "modify the flow in the Delaware River" by increasing the flow during "dry

seasons" and by reducing the flow in "flood stages" (A. par. 32, p. 20).

Defendant alleges that on two different occasions, commissioners were appointed by the States of New York, Pennsylvania and New Jersey, who after negotiations, reached an agreement to apportion the waters between the states respectively, and that on each occasion the Legislature of New York ratified the agreement (A. par. 29, p. 17; par. 39, p. 18; par. 34, p. 22; par. 40, p. 26).

It alleges that what it now proposes to do or take, is in accordance with the terms of the secondly mentioned agreement (A. par. 33, p. 21; par. 32, pp. 22, 23; par. 35, p. 23).

Defendant asserts that because the plaintiff has failed to agree upon the division of these waters, defendant is in position to take them without consent of plaintiff (A. pars. 35 and 26, p. 23).

Plaintiff prays for an injunction perpetually enjoining defendant from diverting the waters of the aforementioned tributaries of Delaware River.

Consolidated Complaint and Answer.

The complaint and amended answer have been consolidated, for the convenience of the court, and printed as Appendix "L" in the Book of Appendices accompanying this brief.

Jurisdiction.

The jurisdiction of the court depends upon Article III, Section 2, of the Constitution of the United States and Section 341, Title 28, U. S. C. A. (p. 171), and has been sustained in.

Kansas v. *Colorado,* 206 U. S. 46;
Wyoming v. *Colorado,* 259 U. S. 419;
Wisconsin v. *Illinois,* 278 U. S. 367.

II.

Summary of the Argument.

There are three primary questions involved in this motion, namely:

(1)

Defendant cannot erect said dams or divert said waters without the affimative authority of Congress, and the approval of plans by the Chief of Engineers and the Secretary of War.

(2)

Defendant cannot divert said waters without the consent of plaintiff.

(3)

The diversion of said waters violates the common law rights of plaintiff and its citizens as riparian owners below the point of diversion.

The Rules of Pleading Applicable to this Motion.

The requirements of pleading in an answer are stated in 1 Encycl. of Pl. & Pr., as follows:

> (p. 873) "Generally if defendant attempts to make defense by answer, he must answer fully all the statements and charges of the bill, with all their material circumstances, without any special interrogatories in the bill for that purpose."
>
> (p. 875) "The answer should be certain as far as practicable; and to so much of the bill as it is necessary to answer defendant must speak directly, without evasion, and not by way of negative pregnant. He must not answer the charges merely literally, but must confess or traverse the substance of each positively and with certainty; particular precise charges must be answered particularly, not in a general manner.

> (p. 876) "Defendant cannot shelter himself behind equivocal, evasive, or doubtful terms, and thus mislead complainant, nor behind a literal denial which amounts to no more than a negative pregnant or an evasion of the points of substance."

Although this motion confesses the matter stated in the answer to be true, such confession is confined to those matters *which are well pleaded,* i. e., matters of fact. It does not, therefore, admit any matters of law which are suggested in the answer or inferred from the facts stated; for strictly speaking, arguments, or inferences, or matters of law, ought not to be stated in the pleading.

When facts are averred which are contrary to any fact of which the court takes *judicial notice,* or which are impossible in law, the court will not pay any attention to the averment, or if the answer avers any fact in opposition to what the court is officially bound to notice, such averment will be considered a nullity.

1 Daniels Chy. Pl. & Pr. (Am. Ed.) 566, 568, 569.
Stephens on Pleading, p. 143.
6 Encycl. of Pl. & Pr., 396, 398.
Louisville N. R. Co. v. *Palmes,* 109 U. S. 244.
Griffin v. *Augusta R. Co.,* 72 Ga. 423.

In the last mentioned case the pleading alleged as true matter contradicted by legislative acts and records of which the court was bound to take judicial notice. It was held that a demurrer to that pleading did not admit such allegations.

Appendices.

The appendices herein referred to are printed separately in the "Book of Appendices" accompanying this brief.

III.

ARGUMENT.

(1)

Defendant cannot erect said dams or divert said waters without the affimative authority of Congress, and the approval of plans by the Chief of Engineers and the Secretary of War.

Facts pertaining to Point (1).

The pleadings admit that Delaware River is an interstate stream rising in the State of New York and emptying into Delaware bay; that it forms the boundary between the States of Pennsylvania and New York, and Pennsylvania and New Jersey; that it is one of the largest of the streams along the eastern seaboard of the United States and is tidal and navigable from Trenton to its mouth; that it has certain tributaries in the State of New York, including Neversink River, Willowemoc Creek, Beaver Kill, East Branch, and Little Delaware; that defendant has taken the necessary procedure under its municipal laws and has obtained permission from the Water Power and Control Commission of the State of New York, as required by the laws thereof and is therefore in position and intends to immediately proceed with the work of erecting dams and creating reservoirs in each of the tributaries mentioned for the purpose of impounding the run-off of 610 square miles of the watershed thereof, and divert therefrom 600 million gallons of water daily for use, primarily to augment its municipal water supply, and incidentally for the development of hydro-electric power; that by the erection of said dams and impounding of waters, it proposes to modify the flow of water in Delaware River, throughout the entire Delaware Valley, by increasing the flow during certain

seasons of the year and decreasing the flow at other seasons of the year.

Defendant claims that it proposes to take only flood waters which would otherwise run to waste, and that the proposed modification of the flow of water in Delaware River will benefit and improve its navigability.

Defendant claims the right to do this under the authority and laws of the State New York; that said tributaries, at the places therein, respectively, where it intends to erect its dams, are intrastate non-navigable streams.

Defendant denies that Delaware River above Trenton is a navigable stream, except that it admits that certain portions thereof are used for the pursuits of fishing, hunting and pleasure.

Defendant does not plead, or claim to have obtained, any Federal authority for said project, or any Federal approval of its plans therefor.

Navigability of Delaware River.

Defendant's admission that the Delaware River below Trenton "is navigable for vessels of small draft" (A. par. 6, p. 7) is less than public records show, and its denial that Delaware River is navigable above Trenton and its assertion that the tributaries in question are non-navigable streams, are contrary to the statutes, history, and decisions of the Courts, of the States of New York, New Jersey and Pennsylvania, and to the official reports of Executive Departments of the United States Government, of which this court takes judicial notice.

Jackson v. *U. S.*, 230 U. S. 1, 5, 18;
Thornton v. *U. S.*, 271 U. S. 414;
Hanley v. *Donoghue*, 116 U. S. 1, 7;
Renaud v. *Abbott*, 116 U. S. 277.

Navigability Below Trenton.

"Delaware River above Philadelphia. The Delaware river is navigable for a distance of 24½ miles above the Pennsylvania Railroad Bridge at Philadelphia to the City of Trenton. It is crooked and has many bars and shoals, but has been improved by dredging a channel 200 feet wide and 12 feet deep from Philadelphia to Trenton. It is marked by buoys and by lighted ranges in the upper end and is easily followed by the aid of the chart. This stretch of the river is used extensively by yachts and is a favored cruising ground.

Steamers of 6 to 9 foot draft make regular trips to all of the towns on the river between Philadelphia and Trenton, and there is also considerable trade on the river in steamers, schooners and barges up to 14-foot draft, to the industrial plants along the shores."

(Supplement to Atlantic Coast Pilot, Atlantic Coast Section 4, Sandy Hook to Cape Henry, May 12, 1928, Department of Commerce, U. S. Coast and Geodetic Survey, p. 72.)

By act of March 3, 1925, Congress authorized the War Department to provide a channel of a project depth of 20 feet in the Delaware River as far as Trenton, in accordance with the recommendations contained in House Document No. 228 at an estimated cost of $1,326,000. (p. 4.) (Statutes at Large, 1925, Chapter 467, p. 1186.)

Navigability Above Trenton.

The Delaware River is navigable for many miles above Trenton and each of the five tributaries in question have been declared public highways.

Colonial Navigation.

An established commerce on Delaware River among the colonies of New York, New Jersey and Pennsylvania ex-

isted prior to the Revolution. When the Union was formed this intercolonial commerce became interstate commerce and, from the beginning of the federal government, has been subject to the control of Congress under the Commerce Clause of the Constitution of the United States.

> "Delaware river, from the head of Cushietunk, tho' not obstructed with falls, has not been improved to any in-land navigation, by reason of the thinness of the settlements that way: From Cushietunk to Trenton falls, are fourteen considerable rifts, yet all passable in the long flat boats used in the navigation of these parts, some carrying 500 or 600 bushels of wheat. The greatest number of the rifts are from Easton downward; and those fourteen miles above Easton, another just below Wells's ferry, and that at Trenton, are the worst. The boats seldom come down but with freshes, especially from the Minisinks: The freight thence to Philadelphia, is eight pence a bushel for wheat, and three shillings a barrel for flour: From the forks, and other places below, twenty shillings a tun for pig iron, seven pence a bushel for wheat, two shillings and six pence a barrel for flour."
>
> (*History of New Jersey, by Samuel Smith, p. 486, published by James Parker, Burlington, N. J., 1765.*)

Laws of New Jersey.

The Legislature of New Jersey by—

Act of May 27, 1783, (Revised Statutes 1846, p. 31) declared Delaware River from northwest corner of New Jersey to boundary line of the State of Delaware a common highway;

Act of November 26, 1808, (Revised Statutes 1846, p. 480) forbid construction of wing dams without special authority of the Legislature, or otherwise obstructing navigation; and by acts passed February 9, 1815 and March 1, 1820 (Revised Statutes, pp. 546 and 547) re-

spectively, enacted legislation regulating navigation on Delaware River above Trenton and forbidding the erection of structures that would impede or injure the navigation thereon. A true copy of the last two acts are printed as appendices "A" and "B," respectively, hereto.

Other acts of the Legislature of New Jersey to preserve the navigation of Delaware River above Trenton are:

An act passed December 5, 1823.

An act passed December 2, 1831.

An act passed February 26, 1834.

An act passed March 1, 1851,

printed in full as appendices "C," "D," "E" and "F", respectively hereto.

By an act entitled "AN ACT to incorporate a company to create a water power in the city of Trenton and its vicinity, and for other purposes." Approved February 16, 1831. (Laws of New Jersey 1831, p. 131) the Legislature of New Jersey incorporated the "Trenton Delaware Falls Company," with certain powers including:

> "Sec. 8. *And be it enacted,* That it shall be lawful for the said company, to erect a wing-dam in the Delaware river, between the mouth of the Assanpink, and the head of Wells' Falls, and a raceway, in, along and near the bank of said river, in the neighborhood of Trenton; *Provided always, that such wing-dam shall be so constructed as not to impede the passage of fish, rafts, arks, and boats in said river"* (p. 133). (Italics ours.)

Laws of Pennsylvania.

The Legislature of Pennsylvania declared the Delaware River to be a common highway and appointed a commission to improve its navigation, by an act passed March 9, 1771, printed in full as Appendix "G," and by an act passed September 28, 1789, provided for the annual appropriation of moneys for clearing and improving the

navigation on certain rivers, including the Delaware. A true copy of that act is printed as Appendix "H."

Other Pennsylvania acts on this subject are:

Act of March 13, 1817 (6 Pa. Laws, p. 422) appointing a commission to improve navigation between Foul Rift and Trenton Bridge.

Act of April 9, 1827 (Pa. Laws, 1827, p. 196) requiring a survey of Delaware Valley from Bristol to Carpenter's Point for improvement of navigation.

Act approved February 8, 1883, calling for report on how to obviate obstructions to navigation.

Act of April 4, 1866 (Pa. Laws, 1866, p. 436) appropriating money to remove obstructions to navigation.

Laws of New York.

The Delaware River, within the State of New York and all of the five tributaries in question have been declared to be public highways for free navigation and commerce, by the Legislature of New York, as follows: Neversink River, by act passed April 16, 1816 (printed in pertinent parts as Appendix "I" hereto); Beaverkill, by act passed March 28, 1817 (printed in full as Appendix "J" hereto); and Delaware River, and its branches in Delaware County, by act passed April 12, 1822 (printed in full as Appendix "K" hereto).

Action of Federal Government.

The improvement of the navigable capacity of Delaware river above Trenton has been the subject of numerous surveys and investigations by the United States War Department.

> "The only navigation at present upon the Delaware River, above Trenton, is that of the rafts which come down during the spring and fall floods. Previous, however, to the construction of canals

and railroads, the river, although difficult to navigate, was an important highway of commerce. The boats first used appear to have been narrow, flat-bottomed scows, from 25 to 40 feet in length, which were allowed to float down with the current, and on their return up were propelled by poles. About the year 1750 'Durham' boats were introduced, so-called from having been first built at Durham Village, ten miles below Easton."

* * * * * * * * *

"About 1810 coal began to be carried down the river in 'arks,' which were simply rectangular pine boxes, usually hinged in the middle like canal-boats, and being from 50 to 80 feet long and 16 wide, and drawing 2 feet of water. These were furnished with oars for use on the reaches of the river between rapids." * * *

"It is proper to mention here that the river was navigated by Durham boats as far as Lackawaxen Creek, seventy-five miles above Easton, and probably much farther."

* * * * * * * * *

"In the summer of 1851, in order to facilitate communication with Easton, and the railroad only being built as far as Lambertville, a steamboat, the Major William Barnet, drawing, when loaded, only 18 inches, was run from Lambertville to Easton, the time occupied making the trip of thirty-six miles being about eight hours."

(House Executive Document No. 1, Part 2, Volume II, 43d Congress, 1st Session, Annual Report of Chief of Engineers, 1873, p. 902, submitted to Congress in Annual Report of Secretary of War, November 24, 1873.)

Other reports of the Secretary of War to Congress are as follows:

Senate Executive Document No. 30, 48th Congress, 1st Session (December 23, 1883),

"Delaware River between Trenton, N. J., and Port Jervis, N. Y." (Annual Report of Chief of Engineers, 1884, pp. 855-857.)

"Delaware River from Trenton, N. J. to Easton, Pa." (House Document No. 226, 65th Congress, 1st Session.) Submitted to Congress by Secretary of War, June 29, 1917.

Report dated February 21, 1924, of Chief of Engineers on an examination of Delaware river from Trenton, N. J. to Easton, Pa. (Authorized by River and Harbor Act, approved September 22, 1922.) Submitted by Secretary of War to Congress February 24, 1924.

These reports were accompanied by maps and contained descriptions of plans and cost estimates to provide a navigable channel 150 feet wide, with a project depth of 12 feet, to Easton, Pa., and also to Port Jervis, N. Y. They also discussed the possible development of water power in connection with such improvements.

They show a constantly increasing commerce to and from a rapidly widening industrial area in the Delaware and Lehigh Valleys. In most of these reports the Chief of Engineers concludes that the improvements under consideration, respectively in the following words—

"It is not deemed advisable at the present time."

In the report of February 21, 1924, the Chief of Engineers states, in paragraph 7 thereof, as follows:

"The areas to the north and west of Easton are rich in natural resources and are highly developed industrially, producing large quantities of cement, iron and steel, antracite coal, etc. A water way with facilities for the economical service of this territory might conceivably carry a large tonnage."

If the cities, and the territory, in the upper Delaware and Lehigh valleys continue to grow and develop, commercially and industrially, in the future as they have in the past, this ground for disapproval will soon be removed.

The activity of Congress and the War Department with respect to the improvement of navigation on the upper Delaware River, as evidenced by the number and frequency of these investigations, is sufficient evidence of the recognized potential importance of this waterway. The definite policy of the Government is to develop the inland waterways.

The diversion of a substantial portion of the water from this river, as proposed by defendant, will not only affect the navigable capacity of the river, but will also destroy or impair the possibility of future improvement when the volume of available commerce does justify the expense. And the 600 million gallons daily "now" proposed to be diverted is only the beginning of the diversion which may ultimately result if dams and aqueducts of the dimensions proposed are constructed.

In *Oklahoma* v. *Texas*, 258 U. S. 584, 586, this court said:

> "We find nothing in any of the matters relied on which takes the river in Oklahoma out of the settled rule in this country. That navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on waters."

The decisions of this court have declared that public streams are not only tidal waters but also all waters navigable in fact for purpose of commerce, even where the river is only rendered navigable for boats or any size by means of locks and canals. *Lewis, Eminent Domain, 2d ed., Section 72, p. 102.*

The Propeller Genesee Chief, 12 How. 443;
The Magnolia, 20 How. 296;

Hine v. *Trevor*, 4 Wall. 555;
The Montello, 20 Wall. 430.

Necessity for federal authority and approval.

By act of Congress (commonly known as the "River and Harbor Act") approved March 3, 1899, it is provided:

> "Sec. 401. It shall not be lawful to construct or commence the construction of any * * * dam * * * in any * * * navigable river, or any other navigable water of the United States until the consent of Congress to the building of such structure shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War" (Title 33, U. S. C. A. p. 377).
>
> "Sec. 403. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any * * * structures in any * * * navigable river, or other water of the United States, * * * except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill or in any manner to alter or modify the course, * * * condition or capacity * * * or * * * channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning of the same." (Title 33, U. S. C. A., p. 397.)

This court has held that the act of Congress above mentioned applies to dams erected in and waters diverted from interstate streams above the navigable portions thereof.

In *United States* v. *Rio Grande Dam & Irrigation Company*, 174 U. S. 690, this court considered on appeal a suit brought by the Attorney General of the United States

to restrain the construction of a dam in the Rio Grande River in New Mexico and the appropriation of the waters thereof for irrigation purposes. The defendants claimed the right because the site of the dam was wholly within the territory of New Mexico and because they intended to impound and divert and exercise the right to divert "the excess storm and flood waters thereof now unappropriated, useless and which go to waste." The answer denied that the river was susceptible of navigation at the point of the erection of the proposed dam. The government contended that the dam would obstruct the navigability of the river below the dam. The case was set down for argument on the pleadings on a motion of the government challenging the sufficiency of the defense. The court below held that the river was not navigable within the limits of the territory of New Mexico and dismissed the bill for want of equity.

It was contended that because the Rio Grande River was not navigable at the point where the dam was to be constructed the act of Congress had no application to that location. But this court held (p. 708):

> "The language is general and must be given full scope. It is not a prohibition of any obstruction to navigation but any obstruction to the navigable capacity, and anything whatever done or half done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interest of commerce required that the navigable waters of the United States should be subjected to the direct control of the national government, and that nothing should be done by any state tending to destroy that navigability without the explicit assent of the national government enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to acts done within the very limits of the navigation of a navigable stream."

The decision in the last mentioned case was based upon Section 10 of the act of September 19, 1890 (c. 907, Section 10, 26 Stat. 454), the first sentence of which is the same as the first sentence of Section 403 (Title 33 U. S. C. A., p. 397) above quoted except that where the act of 1890 required that an obstruction be affirmatively authorized by *law*, the act of 1899 (c. 425, Section 10, 30 Stat. 115, now Section 403 above quoted), substituted the word *Congress*.

The purpose of this change, as explained in *Hubbard* v. *Fort*, 188 Fed. Rep. 987, 997, was that in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S. 211, this court decided, contrary to the contention of the government, that the word *law* included state laws as well as federal laws. Congress thereupon amended the act to require the authority of a federal law, regardless of any authority under state law.

The remainder of that section as it appeared in the Act of 1890, related to the continuance of existing obstructions. By the Act of 1899 Congress enlarged its provisions by adding all of the foregoing quotation from Section 403 (as it now is in the United States Code) after the semi-colon in the fourth line of that quotation. This new portion provides that in addition to the affirmative authority of Congress it is now necessary to have the plans for the structure recommended by the Chief of Engineers and authorized by the Secretary of War and also it is made unlawful to excavate or fill or alter or modify the course, condition, capacity or channel of any navigable water unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to its commencement.

Section 7 of the Act of 1890, re-enacted as Section 9 of the Act of 1899 and now section 401 (Title 33 U. S. C. A. p. 377), has also been changed since the case of *United*

States v. *Rio Grande D. & I. Co.* was decided by requiring the consent of Congress, instead of the permission of the Secretary of War to the building of any dam or obstruction in any navigable waters of the United States.

Since the *Rio Grande* case was decided Congress has therefore strengthened the act, in the following particulars:

(a) by requiring the consent of Congress, instead of by the Secretary of War.

(b) by applying the prohibition not only to navigable portions of streams but also to the non-navigable portions thereof.

(c) by extending the act to apply to structures affecting the navigable capacity, as well as the navigability, of streams.

(d) by requiring the affirmative authority of Congress, regardless of state authority.

In *Hubbard* v. *Fort* (188 Fed. 987, 995) Judge Rellstab held as follows:

> "It will be noted that this section applies to all navigable waters of the United States; that it does not embrace all the structures and works embraced by section 7 of the earlier act, but is limited to bridges, dams, dikes, and causeways; and that the construction of these are prohibited without the consent of Congress, except such as cross waters the navigable portions of which are wholly within the limits of a single state, and which are to be built by state legislative authority. Congressional consent to the building of such structures in all other navigable waters is still necessary by this section. Nor, as contended by complainants, does section 10 of the 1899 act apply only to interstate waters. There is nothing in this section that restricts it to interstate waters. The first part which prohibits 'the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity

of any of the waters of the United States' not only comprehends the kind of structures specifically referred to by section 9 but all others that may be an obstruction to the navigable capacity of the waters of the United States, regardless of whether they are interstate or intrastate."

The State of New York recognized this interpretation of the law in *Wisconsin* v. *Illinois* (278 U. S. 367), where counsel on its behalf contended as follows:

(p. 372) "* * * A duty imposed upon a riparian State, either by international law or treaty, to maintain the navigability of an international waterway 'implies an obligation also to check within places subject to the control of such State commission of any acts which, unless restricted, would prove injurious to navigation generally.' *Hyde, Internat. L., paragraph 183.* This obligation would seem to render improper the tolerance of any diversion productive of such an effect even though it should occur at a point where the river ceased to be navigable and lay wholly within the domain of the acquiescent territorial sovereign. An international stream must be considered as a unity rather than from the viewpoint of the selfish needs of a particular State seeking to divert its waters. 'Where a river traverses or serves as the boundary of territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare.' *Op. Cit., Ib.* This principle seems peculiarly appropriate to the controversy before the Court. *Cf. Farnham, Waters and Water Rights, Vol. 1, paragraph 6.* This principle has the support of the decisions."

* * * * * * * * *

"The rule that a State may not divert the waters of a natural watercourse to the injury of a downstream State or its citizens has been applied by this Court in interstate controversies where even the great consideration of navigation was lacking."

In *Economy Light and Power Company* v. *United States*, 256 U. S. 113, this court considered a case wherein the

United States sought an injunction to restrain the defendant from constructing a dam in the Des Plaines river without the consent of Congress and without the approval of the location and plans by the Chief of Engineers and the Secretary of War. The grounds of this relief were:

> "(1) That the river bed where the dam was being constructed was the property of the United States; (2) that the Des Plaines river was a navigable waterway of the United States, and the proposed construction of a dam therein was in violation of the Act of Congress of March 3, 1899."

The first ground was overruled but the second ground was sustained by the courts below.

In the opinion of this court, delivered by Mr. Justice Pitney, it is stated (p. 116):

> "There is no contention that the consent of Congress for the building of the proposed dam has been obtained, * * * or that the location or plans have been submitted to and approved by the Chief of Engineers and the Secretary of War. Its substantial defense is that the Des Plaines river, at the site of the proposed dam, which is below the city of Joliet, and just above the point where the Des Plaines joins the Kankakee to form the Illinois river, is not navigable in fact, and not within the description 'navigable river, or other navigable water of the United States,' as employed in the Act of 1899."

The District Court found that there was no evidence of actual navigation within the memory of living men and that there would be no present interference with navigation by the building of the proposed dam. This was not disputed by the Circuit Court of Appeals. Both courts found that in its natural state the river was navigable in fact, and that it was actually used for the purpose of navigation and trading in the customary way, and with the kinds of craft ordinarily used for that purpose on rivers of the United States, from early fur trading days

down to the end of the first quarter of the Nineteenth Century.

This court found that this was a part of a well known water route, by water and portage, according to the season, between Lake Michigan at Chicago and the Mississippi river for the fur trading purposes of the early settlers. The opinion then recites subsequent changes due to drainage of swamps, deforestation affecting rainfall and runoff which shortened the duration of high stages of water, the construction of the Michigan canal and the diversion of part of the drainage, but in spite of these changes the Circuit Court found that the river was a continuous stretch of water from the Chicago divide to its mouth (p. 118):

> "and although there is a rapid, and in places shallow water, with boulders and obstructions, yet these things do not affect its navigable capacity; that the same is true of the upper part of the Illinois river above the head of steamboat navigation; and that both streams are navigable and are within the Act of 1899."

This court held:

> (p. 121) "The circuit court of appeals, in passing upon the question of navigability, correctly applied the test laid down by this court in The Daniel Ball, 10 Wall. 557, 563, and The Montello, 20 Wall. 430, 440-443, that is, the test whether the river, in its natural state, is used, or capable of being used, as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

The court then quotes from the decision of Mr. Justice Davis in the case of "The Montello" as follows:

(p. 122) "'the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market. It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway.'"

In conclusion this court said:

(p. 123) "We concur in the opinion of the circuit court of appeals that a river having actual navigable capacity in its natural state, and capable of carrying commerce among the states, is within the power of Congress to preserve for purposes of future transportation, even though it be not at present used for such commerce, and be incapable of such use according to present methods, either by reason of changed conditions or because of artificial obstructions. And we agree that the provisions of Sec. 9 of the Act of 1899 (30 Stat. at L. 1151, chap. 425, Comp. Stat. Sec. 9971, 9 Fed. Stat. Anno. 2d ed. p. 81) apply to such a stream. The act in terms applies to '*any* navigable river, or other navigable water of the United States'; and, without doing violence to its manifest purpose, we cannot limit its prohibition to such navigable waters as were, at the time of its passage, or now are, actually open for use. The Des Plaines river, after being of practical service as a highway of commerce for a century and a half, fell into disuse, partly

through changes in the course of trade or methods of navigation, or changes in its own condition partly as the result of artificial obstructions. In consequence, it has been out of use for a hundred years; but a hundred years is a brief space in the life of a nation; improvements in the methods of water transportation, or, increased cost in other methods of transportation, may restore the usefulness of this stream; since it is a natural interstate waterway, it is within the power of Congress to improve it at the public expense; and it is not difficult to believe that many other streams are in like condition, and require only the exertion of Federal control to make them again important avenues of commerce among the states. If they are to be abandoned, it is for Congress, not the courts, so to declare. The policy of Congress is clearly evidenced in the Act of 1899, and, in the present case at least, nothing remains but to give effect to it."

Defendant claims that its proposed dams will benefit the navigable capacity of Delaware River. That is no defense.

Kansas v. *Colorado*, 206 U. S. 46, 100;
Ford & Son v. *Little Falls Fibre Co.*, No. 47, Oct. Term, 1929, U. S. S. C., decided January 6, 1930.

It admits its intention to immediately proceed with the erection of dams, and to impound and hold the water from a mountain watershed of 610 square miles, and "*now*" divert 600 million gallons daily thereof from its natural watershed to another, and thereby to modify the flow of water throughout the Delaware River valley. It is clear that said dams will constitute "obstructions" "to the navigable capacity of waters of the United States, to wit, Delaware River; will constitute structures in a navigable river or other water of the United States; and will "alter or modify the course, * * * condition or capacity of the channel of navigable water of United States, within the meaning of the above quoted acts of Congress, as interpreted by this court.

The questions of benefit or injury, degree of benefit or injury, or whether a benefit is desired in the form proposed by defendant, are not within the discretion of defendant, but are for Congress, the Secretary of War and the Chief of Engineers to determine.

If, as we contend, the affirmative authority of Congress or of the Secretary of War, or the recommendation and approval of the plans by the Chief of Engineers and the Secretary of War of the plans are necessary prerequisites to the right of defendant to build the dams and divert the waters in question, then the averment of the answer that it is in position to at once proceed with the work under authority of the laws of the State of New York (A. par. 28, p. 16), is incomplete and insufficient because it fails to aver that such federal affirmative authority, recommendation and approval have been obtained, and to plead the same; consequently, the existing averment fails and is a nullity, and defendant stands before the court admitting its intention to proceed without valid authority.

Necessity for Injunction.

No preliminary, interlocutory or other injunction has been issued in this proceeding and there is nothing to prevent defendant from carrying out its declared intention of immediately proceeding with its plans and, by expending large sums of money, creating a *fait* which equity might be reluctant to overturn. Such this court found the situation to be in *Pine* v. *Mayor of New York*, 185 U. S. 93.

In so far as the purposes of the proposed diversion are concerned, it is at least doubtful whether the Secretary of War or Congress can authorize the diversion of waters for municipal supply or power development.

Wisconsin v. *Illinois*, 278 U. S. 367, 415.

We are satisfied, however, that under whatever authority or for whatever purposes, defendant may seek to erect

dams and divert water, the admitted fact that such dams and diversion will alter and regulate the flow of water in Delaware River brings into application to the project the provisions of sections 401 and 403, Title 33 of the United States Code, requiring the affirmative authority of Congress or the Secretary of War, and the recommendation and approval of the plans by the Chief of Engineers and and the Secretary of War, before any of the proposed work can be commenced, and defendant should be enjoined from proceeding at least until it has complied with the acts of Congress.

(2)

Defendant cannot divert said waters without the consent of plaintiff.

Facts pertaining to point (2.)

The complaint alleges that by the proposed diversion defendant seeks to impose upon plaintiff against its will, a system of diversion and appropriation of said waters which can be lawfully accomplished only by voluntary compact between the states, with the consent of Congress (C. par. 53, p. 25). Defendant denies this (A. par. 2, p. 6) and then, by way of affirmative defenses, (A. pars. 29 and 30, p. 17; par. 33, p. 21; pars. 35 and 36, p. 23; par. 40, p. 26) it asserts what it terms "the basic and reciprocal rights of both of the plaintiff and of the Commonwealth of Pennsylvania, to the use of a reasonable portion of the waters of Delaware River". It recites the negotiations in 1923-1925 and 1926-1927, between commissioners of the States of New York, New Jersey and Pennsylvania, and the agreements of said commissioners on January 24, 1925, and January 13, 1927. It recites the ratification of both of those agreements by the Legislature of the State of New York. It asserts that everything which it proposes to do is in accord with the find-

ings of said commissioners and is predicated upon the principles, limitations and restrictions contained in the second proposed compact negotiated between them; that by reason of the delay caused by said negotiations, the need for proceeding with its plan has become so urgent and pressing that it can no longer delay the work, and it proceeds with its plans to take what it deems a reasonable portion of the waters of said stream.

Validity of Alleged Agreement.

Defendant does not allege or claim that either of the alleged agreements was ratified by the legislatures of either the state of New Jersey or the commonwealth of Pennsylvania, or received the consent of Congress. Without such mutual ratification, there can be no agreement. Without the consent of Congress, such an agreement, if ratified by the Legislatures of all the states, would be null and void.

Defendant's denial and affirmative defenses are, therefore, not well pleaded and are a nullity, under the rules of law applicable to this motion as above stated, because, as a matter of law, such an agreement between states is an act of legislation requiring the ratification of the legislatures of the states involved, and the consent of Congress.

Art. I, Section X, par. 3, U. S. Constitution.
Kansas v. *Colorado,* 206 U. S. 46, 100.

Defendant now proposes to arbitrarily force upon plaintiff against its will terms which the legislatures of New Jersey and Pennsylvania have refused to ratify, as unsatisfactory. Its doctrine is "Compact by Compulsion."

In *Kansas* v. *Colorado* (206 U. S. 46), where each state had a different rule on the subject of the use of waters, this court held as follows:

> (p. 95) "Neither state can legislate for, or impose its own policy upon the other."
>
> (p. 97) "One cardinal, underlying rule of the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none."

In *Wyoming* v. *Colorado* (259 U. S. 419) Mr. Justice Van Devanter interpreted the language of the *Kansas* v. *Colorado* decision as follows:

> (p. 464) "What the court said about 'equality of right,' refers, as the opinion shows (p. 97), not to an equal division of water, but to the equal level or plane on which all the states stand, in point of power and right, under our constitutional system."
>
> * * * *
>
> "Here the complaining state is not seeking to impose a policy of her choosing on the other state, but to have the common policy which each enforces within her limits applied in determining their relative rights in an interstate stream."

By the same token plaintiff here asserts its equality of right, and resists the attempt of defendant to impose upon it a policy which is enforcible in neither state.

We assert under this point the right to make or refuse to make interstate compacts and we resist the imposition of such compacts upon us against our sovereign will.

The power to make an apportionment or divide waters between states is a legislative and not a judicial function. The only manner in which it can be done is by compact between the states. The Constitution of the United States by Article I, Section X, par. 2, forbids such a compact without the consent of Congress. Subject to that limita-

tion, the right of two states to make a compact is reserved to the states under the 10th amendment to the Constitution, and that power is classified in the Constitution under the heading of "Legislative Powers"

Under the division of powers between Legislative, Executive and Judicial, as this court has frequently held, the courts can neither legislate, nor decree a substitute for legislation. This court has no power, on any theory, to make, by judicial decree, an apportionment or division of waters between two states against the legislative policy or consent of either of them, or impose upon either state a rule of property right contrary to that adopted by its own legislature. The courts of the states in question could not do so, and this court has no power greater than that delegated to it by the states.

Chancellor Kent says:

> "The right of eminent domain, or inherent sovereign powers, gives to the *legislature* the control of private property for public uses, and for public uses only. * * *;"
>
> "It undoubtedly must rest, as a general rule, in the wisdom of the *legislature*, to determine when public uses require the assumption of private property;" (2 Kent's Com., pp. 338, 339, 340). (Italics ours.)

Necessity, or public necessity, is therefore a matter exclusively for *legislative* determination. That is the law in New York and New Jersey. Only the question of damages is *judicial*. The rule of law governing property rights is also essentially a legislative question. If, as we have seen, the equality of states, under the federal constitution, prevents one state from imposing its legislative policy upon another, then the questions of public necessity and property rights within a state are for its legislature, and no other, to determine. These rules prevailed in each of the states in question at the time the federal constitution was adopted (as it still prevails) and

the states delegated, and could delegate, to the federal government no powers inconsistent therewith.

Consequently the question of what is public necessity, and what are the property rights of New Jersey citizens, in the present case, are not judicial questions for the determination of this court, but legislative questions "reserved to the states respectively," under the federal constitution.

If the courts of the states could not and can not, determine these questions, the federal courts cannot do so.

In *Wisconsin* v. *Illinois* (278 U. S. 367) this principle was well stated in the argument of counsel on behalf of the State of New York, in the following words:

> (p. 374) "* * * It is respectfully submitted that the States have not surrendered to the Federal Government the right to permit a diversion from a natural watercourse for the local purposes of a municipality and to the serious injury of a great commerce, merely because, through that injury, navigation is affected."

Other Sources of Supply.

Plaintiff alleged that defendant had investigated and found available additional sources of water supply in intrastate streams therein mentioned where a dependable yielding capacity of 1,769 million gallons daily (enough to meet defendant's requirements for the next fifty years) was available without diverting water from one watershed to another or from the use or benefit of any other state. (C. par. 37, pp. 20, 21.) This allegation defendant denies except that it admits that it "has made investigations within various parts of the State of New York for a suitable supply of water for itself and its inhabitants from streams or other bodies of water wholly within the State of New York." It does not state the result of these investigations, or that they failed to show a de-

pendable yield of a suitable or adequate supply. It does not even claim that it is *necessary* to take waters from another watershed. This is, therefore, an evasion of the allegation of the complaint, and not a complete answer.

The complaint not only alleges that such quantities are available to defendant without depriving plaintiff of its rights, but shows exactly where those sources are and the dependable daily yield available at each place.

In view of the above admission, and absence of explanation, the denial of the details is quite unsatisfactory and, as Mr. Justice Holmes said of the denial of the Sanitary District of Chicago, that it had abstracted certain alleged quantities of waters, "the denial cannot be taken very seriously."

Sanitary District of Chicago v. *U. S.*, 266 U. S. 405, 424 (Bottom).

Under the maxim "He who seeks equity must do equity," it seems reasonable to require defendant to exhaust its own sources of available water supply before it attempts to take water to the use of which the people of sister states are entitled.

We maintain that, even if the particular sources of supply in question are located in the state of New York, and therefore within its physical power or possession, defendant cannot by abstracting the water, enforce against plaintiff a division of waters on terms which it has twice disapproved.

Reciprocal Rights.

The "principle of basic and reciprocal rights of adjacent states to an equitable apportionment of waters," asserted in the answer has no foundation in law, and has never received the sanction of any court. It may have been suggested by a misconception of decisions of this court in the cases of *Kansas* v. *Colorado* and *Wyoming*

v. *Colorado, supra.* Both of these cases are hereinafter discussed, at length, under point (3).

In the *Kansas* v. *Colorado* case the court based its decision on three grounds:

(a) The diversion complained of had existed for a long time and the water diverted was an absolute necessity to the arid country in Colorado where it was used for irrigation purposes.

(b) The doctrine of appropriation prevailed in Colorado and the common-law rule of riparian proprietorship prevailed in part of Kansas, but, since Kansas recognized the right of appropriating waters for irrigation, the court was unwilling to impose a different rule on Colorado.

(c) The diversion by Colorado was not out of the natural watershed of the river into another watershed where Kansas could get no benefit of the water.

The court did not undertake to make an apportionment of waters. It merely refused to disturb a long existing condition, or to impose a legislative rule contrary to that in force in Colorado and recognized by Kansas.

In the case of *Wyoming* v. *Colorado* the court based its decision on the sole ground that in both states the doctrine of appropriation prevailed, and the court merely determined the proportion of water to which each state was entitled on the basis of priority of appropriations. It did not undertake to make an equitable division or apportionment of waters between the two states.

None of the conditions found by the court to exist in either the *Kansas* v. *Colorado* or the *Wyoming* v. *Colorado* cases exist in our case. We are not dealing with an existing diversion. As is hereinafter shown under point (3), both states have adopted and consistently applied the common-law rule of riparian proprietorship. No condition of necessity exists in this case, any more than

there was a necessity for the Sanitary District of Chicago to continue permanently to divert water from Lake Michigan for the purpose of disposing of its sewage (*Wisconsin* v. *Illinois*, 278 U. S. 367). In that case and in our's there are other feasible and practicable ways to satisfy the need. The waters are proposed to be diverted from one watershed to another where plaintiff can never receive any benefit therefrom. Here the waters are useful and used for the purposes of navigation (see point (1)).

Necessity.

The theory of necessity, as urged by defendant, has no foundation in law. It is both economically and legally unsound. It is predicated on the selfish hypothesis that when a city is great the rights of the rest of the world must be sacrificed to supply its needs and promote its continued growth. The State of New Jersey, and its municipal subdivisions, have an equal right to growth. Whether they now need the waters of the Delaware River for public consumption or otherwise, is beside the point. In the case of *Economy Light and Power Co.* v. *United States*, (256 U. S. 113) Mr. Justice Pitney said (p. 123);

> "* * * but a hundred years is a brief space in the life of a nation;"

Within that brief space of time there may be within the State of New Jersey municipalities, or an aggregation of municipalities, whose population and needs will be as great as that of New York City. The natural advantages which New Jersey enjoys by reason of its bordering on the Delaware River must be conserved for the future needs of its people, and this court cannot undertake to regulate or promote the economic and population development of one section of the country at the expense of another. The theory of the defendant is that New Jersey and its people must sacrifice their God-given rights to contribute to the growth of the defendant. The question is not a judicial question but is purely and simply a political

question. The defendant claims necessity of the water to support the *future* requirements of its inhabitants, yet in building the dams and flooding the areas behind them it proposes to wipe out of existence numerous thriving municipalities where thousands of people live contentedly and from choice. But that is an affair of the legislature of the State of New York. There is no law or right to impose the same fate indirectly and *in futuro* upon people who choose to live in New Jersey.

The 14th Amendment of the Constitution of the United States provides:

> "Nor shall any state deprive any person of life, liberty or property without due process of law."

The attributes of sovereignty impose upon the State of New Jersey the obligation to protect its citizens from injury. If New Jersey was a separate nation it would be its duty to protect the rights of its people in the present case by force of arms, if necessary, just as Austria, Hungary, Jugoslavia, Bulgaria or Rumania would be compelled by force of arms, if necessary, to defend the rights of its citizens against the diversion of waters of the Danube by Germany. Under the Constitution New Jersey cannot go to war with New York State. The Constitution having deprived New Jersey of that weapon of defense, has furnished it with another, in the form of the restraining powers of this court. Since this court cannot force two states to enter into a compact against the will of either, it cannot, by judicial decree, order the same result by undertaking to decree an equitable division of waters of an interstate stream.

Necessity is a relative and not an absolute term. If "necessity" can "*now*" be relieved by 600 million gallons daily, how long will it be before the same necessity will recur? How long will it be before "necessity" (as defendant interprets the word) will require the diversion of the entire run-off of the Delaware watershed on

the New York State side? Philadelphia may get the same idea and divert some or all of the water from the Lehigh River watershed. A glance at the map attached to the complaint (as Exhibit "A") will show that in such case what is now the Delaware River would become a rivulet trickling among the rocks.

The vice of this thing is in its inception. If it is not prevented now, vast expenditures will be made and a court of equity will be reluctant to set them at naught, as this court was to disturb a long standing condition in the *Kansas* v. *Colorado* case, or to *immediately* enjoin the diversion from Lake Michigan in *Wisconsin* v. *Illinois*, even after the court found that the diversion was unlawful.

Let us get a picture of the magnitude of the defendant's proposed project. Paragraph 19 of the complaint alleges that defendant "has completed plans and lately announced its intention to immediately appropriate $1,000,000 for preliminary work, and to begin actual construction, before midsummer of the present year, of dams, embankments and other water structures and appurtenances, at the ultimate cost of $272,587,000, etc." Defendant admits every part of this allegation except the appropriation and ultimate cost figures. ("A" par. 12, p. 9; par. 21, p. 12). It does not allege a different cost.

Since amounts are always relative and their proportions can be comprehended best by comparison, let us observe that the Boulder Dam project on the Colorado River, as approved by compact between all of the interested states except Arizona, and which is popularly supposed to be the largest project of its kind, is estimated by Mr. LaRue of the United States Geological Survey to cost approximately $164,000,000. ("The Colorado River Compact," by Reuel L. Olson, 1926, p. 51.)

The time to complain about and correct a matter of such magnitude is before it is commenced, not after it is

completed: a delay of two years defeated the plaintiff in *Pine* v. *Mayor of New York*, 185 U. S. 93.

We submit that defendant cannot take these waters without the voluntary legislative consent of plaintiff, and then only after a compact for that purpose has been approved by Congress.

Art. I, Section X, par. 3, U. S. Constitution.
Kansas v. *Colorado*, 206 U. S. 46, 100.

(3)

The diversion of said waters violates the common law rights of plaintiff and its citizens as riparian owners below the point of diversion.

Facts Under Point (3).

Plaintiff alleges that the common law rule of riparian proprietorship applies in both New Jersey and New York and that the riparian proprietors, including plaintiff, along Delaware River in New Jersey have vested property rights in the flow of the waters proposed to be diverted which defendant threatens to invade (C. par. 16, p. 10). Defendant disclaims knowledge of and therefore denies this allegation, except that it admits that the common law rule has been applied in both states "to certain bodies of water"; it denies that this rule has been adopted, applied or observed in New Jersey, Pennsylvania and New York with respect to Delaware River (A. par. 10, p. 8).

This denial and this allegation are a nullity because, in so far as they relate to New Jersey and New York, they are in opposition to the decisions of the highest courts in those states. We have not pursued the subject in Pennsylvania because that State is not involved in the present motion.

In the course of nature the waters defendant proposes to divert from the Delaware River watershed into the

Hudson River watershed and then convert to the use of its inhabitants, flows down the Delaware River over the non-tidal river bed owned by the plaintiff and other riparian proprietors in New Jersey, and over the tidal river bed owned by plaintiff, into Delaware Bay and thence into the Atlantic Ocean. That has been their natural course from time immemorial.

The portion of the water proposed to be diverted could never return to the Delaware watershed.

The Common Law.

Sir Matthew Hale stated the English common law with respect to ownership of non-tidal streams as follows:

> "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, *asque filum aquae;* and the owners of the other side the right of soil or ownership and fishing unto the *filum aquae* on their side."
>
> (Hale's *De jure maris,* History and Law of the Foreshore and Sea Shore, Moore & Hall, 3d ed. p. 370.)

Sir William Blackstone speaks of water rights as follows:

> "Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land,* says Sir Edward Coke, comprehendeth, in its legal signification, any ground, soil or earth whatsoever; as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. * * *. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law; * * *. For water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can only have a temporary, transient, usufructuary, property therein; where-

fore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land, which that water covers, is permanent, fixed, and immovable; and therefore in this I may have a certain substantial property; of which the law will take notice, and not of the other (II Bl. Com. 18).

Following the above is a note of Sharswood's reading as follows:

"'The right to the use of water rests upon clear and settled principles. *Prima facie* the proprietor of each bank of a stream is the proprietor of half the land covered by the stream; but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and, consequently, no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, or throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years.' Sir John Leach (1 Sim. & Stu. 190). * * * Though the proprietor may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. 3 Kent, 537." (1 Sharswood's Bl. Com. 403, 404.)

Chancellor Kent states the English common law with respect to the rights of riparian owners to the unaltered and undiminished flow of waters, and the ownership of the bed of both tidal and non-tidal streams, as follows:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the

water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate. Without the consent of the adjoining proprietors, he cannot divert or diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above, without a grant, or an uninterrupted enjoyment of twenty years, which is evidence of it. This is the clear and settled general doctrine on the subject, and all the difficulty that arises consists in the application. The owner must so use and apply the water as to work no material injury or annoyance to his neighbor below him, who has an equal right to the subsequent use of the same water'' (3 Kent's Commentaries, pp. 439, 440).

(p. 427) "It is a settled principle in the English Law, that the right of soil of owners of land bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends to highwater mark; and the shore below common, but not extraordinary high water mark, belongs to the state as trustee for the public; and in England the crown, and in this country the people, have the absolute propriety interest in the same * * *. But the shores of navigable waters, and the soil under them, belong to the state in which they are situated, as sovereign. The right of sovereignty in public rivers above the flow of the tide is the same as in tide waters; they are *juris publici,* except that the proprietors adjoining such rivers own the soil, *ad filum aquae.* * * *. The proprietors of the adjoining banks have a right to use the land and water of the river, as regards the public, in any way

not inconsistent with the easement; and neither the state nor any other individual has the right to divert the stream, and render it less useful to the owners of the soil." (p. 429) "This principle of the common law has been recognized and prevails in the states of * * * New York, New Jersey, * * *" (3 Kent's Com. pp. 427, 429).

This court has repeatedly held that it is for each state to determine whether the title to the bed of navigable rivers is in the state or the riparian owner and to what extent the prerogative of the state shall be associated with such waters and the lands under them and also that each state may determine for itself what rights, if any, attach to the ownership of lands adjacent to such waters and on these questions the federal courts follow the decisions of state courts. *(Lewis, Eminent Domain, 2d ed. Section 76b, p. 114).*

Shively v. *Bowlby,* 152 U. S. 1.

St. Anthony Falls W. P. Co. v. *St. Paul Water Comm'rs.,* 168 U. S. 349.

Illinois Central R. R. Co. v. *Illinois,* 146 U. S. 387.

The title of a state to the bed of tidal streams is held in trust for the people at large and is therefore inalienable and if inalienable, it cannot be taken from them except by consent of the state manifested by an act of its Legislature.

Common Law in New Jersey.

The first constitution of New Jersey, adopted July 2, 1776, provided in Article XXII, as follows:

"That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law of the legislature; * * *" (1 Comp. Stat. xxxii.)

The present constitution of New Jersey, adopted June 29, 1844, provides in Article X, paragraph 1, as follows:

> "The common law and statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitation, or be altered or repealed by the legislature; * * *." (1 Comp. Stat. xlvii.)

From the beginning to the present time the courts of New Jersey have held that the state is the absolute owner of all navigable waters within its territorial limits (*Stevens* v. *Paterson &c. R. Co.*, 34 N. J. L. 532), and of the soil below high water mark where the tide ebbs and flows.

Gough v. *Bell*, 21 N. J. L. 156; 22 N. J. L. 441; 23 N. J. L. 624.

Arnold v. *Mundy*, 6 N. J. L. 1.

State v. *Jersey City*, 25 N. J. L. 525, 529

In *Attorney-General* v. *Delaware and Bound Brook R. R. Co.*; 27 N. J. E. 1, the Attorney-General of New Jersey filed an information alleging that the defendant had been guilty of a purpresture, and that a bridge which was in the process of construction across Delaware River near Yardleyville, above Trenton, and above tide water, was a public nuisance. The opinion of the Court of Chancery, delivered by Chancellor Runyon, reads, in part, as follows:

> (p. 6) "The royal charters for the territories in which what are now the States of New Jersey and Pennsylvania were embraced, bounded them on the Delaware; that in which this state was included, by 'the east side' of the river, and the other, 'on the east' by the river. The crown was advised in 1721 that these grants did not include the river, or any part of it, or the islands therein, and that the right to them remained in the crown. *Chalmers' Opinions* 90. By the treaty of peace between the United States and the King of Great Britain, in 1783, the latter relinquished all claims to government, propriety and territorial rights to the for-

mer. The consequence was that the river became, *by conquest*, the boundary between the states; and being such, and the original property being in neither of them, and there being then no convention between them in regard to it, each state, by the rule of international law, had dominion to the middle of the stream. At the close of the Revolution, the common law of England was in force in this state; for, by the constitution of July 2, 1776, it was provided that that law should remain in force in New Jersey, until altered by the legislature. By the common law, the ownership of the soil of all rivers not navigable, that is, in which the tide does not ebb and flow, is in the riparian owners. In the case of public rivers which, though not navigable in the common law sense of the term, are, nevertheless, navigable in fact, the ownership of the soil is in the riparian owners, subject to the public right of navigation. And so, too, though the river be declared (as was the Delaware, by act of the colonial legislature of New Jersey in 1771, (*Allison's Laws* 347) and the compact between this state and Pennsylvania in 1783 to be a public or common highway. *Juxon* v. *Thornhill, Cro. Car.*, 132; Hale's DeJure Maris, c. 3; Harg. Law Tracts, p. 9; Lord Fitzwalter's case, 1 Mod. 105; 3 Kent's Com. 427; Angell on Watercourses, Sections 535, 545."

* * * * * *

The state has no *jus privatum* in the soil of the Delaware above tide-water; that is in the riparian owners, subject to the public easement of navigation, and to such regulation by the legislature of the waters as the public right of navigation may require. The right of the riparian owners to the soil of the river is subordinate to the right and power of the state to use and appropriate the river to the public good in promotion of navigation; and, as to the jurisdiction and power of the state over it, the river above tide water is to be regarded as a navigable stream. *Vattell, Book 1,* Sections 249, 272; *Binney's Case, 2 Bland* 99; *Commissioners of*

Homochitto River v. *Withers*, 29 *Miss.* 21; *Woolrych on Waters* 46."

This decision was affirmed by the New Jersey Court of Errors and Appeals in 27 N. J. E. 631, and has been cited with approval and followed without modification by that Court in—

Gray, Attorney-General v. *City of Paterson*, 60 N. J. E. 385.

Doremus v. *City of Paterson*, 65 N. J. E. 711.

Other New Jersey cases in point are:

Arnold v. *Mundy*, 6 N. J. L. 1;

Attorney-General v. *D., L. B. B. R. R. Co.*, 27 N. J. E. 1; 631.

State Board of Health v. *Phillipsburg*, 83 N. J. E. 402, 415,

Numerous New Jersey cases hold that a riparian owner has the right to make reasonable use of the water of such streams and to have the flow of such water over or past his land without diminution, alteration or diversion save by his consent.

Holsman v. *Boiling Springs Bleaching Co.*, 14 N. J. E. 335;

Farrell v. *Richards*, 30 N. J. E. 511;

Soc. for. E. U. M. v. *Morris Canal, &c., Co.*, 1 N. J. E. 157.

Common Law in New York.

The Constitution of the State of New York provides as follows:

"Such parts of the common law, and of the acts of the Legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred and seventy-five, and the resolutions of the Congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred

and seventy-seven, which have not since expired, or been repealed or altered; and such acts of the Legislature of this State as are now in force, shall be and continue the law of this State, subject to such alterations as the Legislature shall make concerning the same."

(Article 1, Section 16.)

The courts in New York State have likewise applied and followed the common-law rule that the title to lands bounded by a fresh water stream, whether navigable or not, extends to the middle thread thereof, subject only to the public use for navigation in case of a navigable stream.

Canal Fund Commissioners v. *Kempshall,* 26 Wend. 404 (1841);

Morgan v. *King,* 30 Barb. 9 (1858);

Smith v. *City of Rochester,* 92 N. Y. 463 (1883);

Crooked Lake Nav. Co. v. *Keuka Nav. Co.,* 4 N. Y. 380 (1887).

The courts of New York State have also held uniformly that riparian owners are entitled to the common-law right of the natural and usual flow of water over and past their lands without diversion, alteration or diminution; that this is a corporeal hereditament and is an incident to and, contrary to defendant's contention in its answer, is properly classified at common-law, equally with the land itself as real property.

(Real property law, chapter 50, section 2, New York Consolidated Laws.)

Shobel v. *Kerr Salt Co.,* 164 N. Y. 303, 320, 321.

Van Etten v. *City of New York,* 226 N. Y. 483 (1919);

City of New York v. *Blum,* 208 N. Y. 237 (1913);

United Paper Board Co. v. *Iroquois Pulp & Paper Co.,* 226 N. Y. 38 (1919);

Fulton County Gas & Electric Co. v. *Rockwood Mfg. Co., Inc.,* 238 N. Y. 109 (1924).

In *U. S.* v. *Rio Grande D. & I. Co., supra,* this court said:

> (p. 702) "The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent (3 Kent, sec. 439)."

In *Ford & Son* v. *Little Falls Fibre Co.,* (No. 47, October Term, 1929) this court, in an opinion delivered January 6, 1930, by Mr. Justice Stone, sustained the rights of a riparian owner on the Mohawk River, New York, in his common law rights under the laws and decisions of New York State therein cited, against an invasion thereof attempted under the supposed authority of a permit obtained from the Federal Water Power Commission. The Court said, in part, as follows:

> "We think the interest here asserted by the respondents, so far as the laws of the State are concerned, is a vested right acquired under those laws * * *."

The Validity of Riparian Rights.

These decisions declare the common rule of law applicable alike in both New Jersey and New York. Contrary to the suggestion contained in the answer there is no exception in either state with respect to Delaware River.

Reference is made in the answer to acts of the Legislature of New Jersey authorizing diversion of Delaware River waters for canal navigation. The diversions of waters for canal purposes were solely to promote navigation.

New Jersey, like New York State, also permits, by and under certain acts of its legislature, municipalities to acquire lands by condemnation or otherwise, and to build reservoirs, impound and divert waters for municipal purposes within the State.

But, whether the diversions authorized are to promote navigation and commerce or for municipal purposes, the statutes of New Jersey authorizing the same were within its legislative power, and were limited in their effect to the territorial limits of the state, and in no case affected the property rights of citizens of adjoining states. If the proposed acts of defendant were so limited, we could not complain.

No state has authority to act within its own territorial limits, in a manner that affects the rights of persons in another state. The rule is equally applicable to nations.

On June 12, 1880, Mr. Evarts, Secretary of State, transmitted to the United States Legation at Mexico a letter from the Governor of Texas invoking the interposition of the United States, on a complaint that citizens of Texas living on the eastern shore of the Rio Grande River suffered a diminution of the flow of the river by the diversion of its waters into the irrigation ditches of Mexico on the opposite side. In his letter of transmittal Mr. Evarts said:

> "This, if true, would be in direct opposition to the recognized rights of riparian owners, and, if persisted in, must result in disaster and ruin to our farming population on the line of Rio Grande and might eventually, if not amicably adjusted, through the medium of diplomatic intervention, be productive of constant strife and breaches of the peace between the inhibtants of either shore" (1 Moore's International Law Digest, p. 653).

Eminent Domain.

Within the respective states the sovereign, or the agencies expressly endowed with the power of eminent domain, may acquire by condemnation the rights of flowage of riparian proprietors below the point of diversion.

The power of eminent domain, with all its incidentals, is vested in the legislatures of the several States by the

general grant of legislative powers contained in the Constitution and can be exercised only by virtue of legislative enactment. The time and manner and occasion of its exercise are wholly in the control and the decision of the Legislature, subject to constitutional limitation. *(Lewis, Eminent Domain, 2d ed. Section 237, p. 562).*

The necessity or expediency of appropriating property for public use is not a subject of judicial cognizance *(Ibid, Section 238, p. 564, 565).*

Boom Co. v. *Patterson,* 98 U. S. 403, 406.

Eminent domain is the power of a sovereign to appropriate private property for public use or benefit *(Lewis, Eminent Domain, supra,* Sec. 1, p. 1) and pertains to sovereignty as a necessary, constant and inextinguishable attribute (*Ibid,* Sec. 3, p. 9). In most of the States of the Union, including the States of New Jersey and New York, this power has been delegated by the people to the legislative department of the government in the general grant of legislative power, limited by the condition that—"private property shall not be taken for public use without just compensation" (*Ibid,* Sec. 61, p. 72).

Art. I. Section 16, *Constitution of New Jersey;*
Art. I, Section 6, *Constitution of New York.*

Every riparian proprietor has a right that the waters of the stream shall continue to flow in its natural and accustomed quantity (including the flood waters), quality and manner, subject only to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. This right is a part of his property in the land and in many cases constitutes its most valuable element.

Any violation of this right in the exercise of the power of eminent domain is a taking of private property for which compensation must be made and it makes no dif-

ference whether the stream is public or private, navigable or not navigable (*Ibid,* Section 61, p. 72).

Garwood v. *N. Y. C. R. R.,* 83 N. Y. 400.

The purposes for which a riparian proprietor may use the water of a stream are for domestic purposes, for watering stock, and for irrigation and for manufacturing. The first two purposes are matters of absolute right and each proprietor may take whatever is necessary for these purposes without regard to the effect of lower proprietors. The right to take water for irrigation and manufacturing is qualified and limited by the existence of like rights in lower owners, and must be exercised with due regard thereto.

No riparian owner has a right, as against lower proprietors to take and divert water for the use of non-riparian owners (*Ibid,* Section 61a, p. 74).

Parry v. *Citizens Water Works Co.,* 37 N. Y. St. 715;

Standen v. *New Rochelle Water Co.,* 36 N. Y. Supp. 92.

Riparian rights in a stream pertain to the land abutting on streams and pass with the title to the property. They are independent of the use made of the property or the purpose for which it is held. The fact that the property is held for public use does not affect the question of riparian rights. Those rights pertain to the property and the use must be upon the property for the benefit of the property and its occupants. A city or a water company which is a riparian proprietor cannot take and sell the water of a stream to non-riparian owners (*Ibid,* Section 61b, p. 74).

Garwood v. *N. Y. C. R. R., supra.*

The rights of lower riparian owners cannot be interfered with by the diversion of water to supply a city

without compensation to the lower owners (*Ibid*, Section 62, p. 75).

Higgins v. *Flemington Water Co.*, 36 N. J. E. 583;

Acquackonnock Water Co. v. *Watson*, 29 N. J. E. 366;

Smith v. *City of Rochester*, 92 N. Y. 463;

Stanford Water Co. v. *Stanley*, 39 Hun. (N. Y.) 424.

The right of a riparian owner to take sufficient water for a domestic use does not apply to a city. (*Ibid*, Section 62, p. 79).

> The right of a riparian owner is to have the stream continue to flow through his land in its usual quantity, at its usual place and at its usual height (*Ibid*, Section 63, p. 81).
>
> "It is a general rule that statutes have no extra-territorial effect. It follows that one state cannot authorize the condemnation of property in another state; also, that it cannot authorize works which will produce actionable damages in another state, * * * ." *Ibid*, Section 251, p. 588.)

In *Pine* v. *Mayor of New York*, 112 Fed. 98, the Circuit Court of Appeals considered a case in which the City of New York had constructed a dam across the western branch of a river wholly in New York State for the purpose of a water supply. The eastern branch of the same river was wholly in the State of Connecticut. Below the confluence of the two branches the river formed the boundary line between Connecticut and New York. Plaintiff, therein, a lower riparian owner, brought an action to restrain the construction of the dam. At page 99, the court said:

> "The contention is understood to be that the latter decisions are authority for two propositions: (1) That the complainant's property rights taken by defendant are easements dependent upon servitudes upon land in the state of New York, which servi-

tudes the State of New York may under its own law, extinguish upon making constitutional compensation, and thereby enable the defendant to continue the diversion; (2) that the statutory provision for compensation is the only remedy to which the complainants may resort in the state of New York. The affirmance of the second proposition depends upon the establishment of the first. If the state of New York may extinguish the so-called servitudes in that state in the exercise of its power of eminent domain, and thereby separate the same from complainants' property in Connecticut, so as to satisfy the complainant's whole claim for compensation, it may, of course, limit those injured to any method otherwise constitutional for making compensation. But if the act of diversion is tortious, and is not relieved of such character by some power of the state to extinguish the alleged servitudes, and thereby satisfy the complainant's whole demand for compensation, then the statute of New York, as a compulsory statute, is not binding upon the owners of riparian rights in Connecticut, and this Court will not compel such owners to employ the statute for the purpose of redress. A state cannot enact a statute purporting to authorize property to be taken beyond its boundaries, and deny a remedy to a person wronged unless he resort to and thereby ratify the statute by securing his compensation pursuant to it. In such case the state seizes by wrong and without constitutional rights under the color of statute, and insists that the offended person shall waive the tort, and declare the tortious act a valid act, by seeking his remedy under the very statute which as to him as void and ineffective. The wrongdoer thus by sheer might commits an actionable wrong, and shields itself from answering therefor, unless pursuant to the statutory command by which the wrong was ordered done."

That case came to this court and the decision of the Circuit Court of Appeals was reversed on the sole ground that the plaintiff had waited for two years and allowed the City of New York to expend large sums of money before he sought to enjoin the construction of the dam.

This court said:

> "On that ground alone, and without deciding whether plaintiffs have a legal right to recover damages, the decrees of the Circuit Court of Appeals and the Circuit Court will be reversed and the case remanded to the latter court, with instructions to set aside its decree and to enter one providing for an ascertainment, in the way courts of equity are accustomed to proceed, of the damages, if any, which the plaintiffs will suffer by the construction of the dam * * * and giving a time within which the defendant will be required to pay such sum, and that upon failure to make such payment an injunction will issue as prayed for * * * ." (185 U. S. 93, 96, 97, 99.)

While this court refused to enjoin the City of New York in that case because the plaintiff had slept on his rights and thereby created an equitable estoppel, it did say that if the damages were not paid the decision below would be affirmed.

In *Octoraro Water Company's Petition* (15 Pa. Dist. Rep. 767), the water company had legislative authority to dam a stream in Pennsylvania and to condemn lands for that purpose. The stream flowed into Maryland and the dam, constructed in Pennsylvania, injured the riparian rights of owners in Maryland.

The Pennsylvania court held:

> Such a statute of one state to confer the power of condemning lands situated in another state for public purposes is ineffective. In *Randolph on Eminent Domain*, Sec. 28, page 27, it is said: 'It is, of course, inconceivable that a sovereign should contemplate the direct expropriation of property within a foreign state. Such action would be clearly unwarrantable.' A state cannot enact a statute purporting to authorize property to be taken beyond its boundaries, and deny a remedy unless the owner resort to and thereby ratify, the statute by securing his compensation pursuant to it. In such

case, the state seizes by wrong and without constitutional right, under the color of the statute and insists that the offended person shall waive the tort and declare the tortious act a valid act by seeking his remedy under the very statute which, as to him, is void and ineffective; *Pine* v. *Mayor, etc., of City of New York,* 12 Fed. Repr., 98. In *Holyoke Water Power Co.* v. *Connecticut River Co.,* 52 Conn. 570, the Supreme Court of that state said: 'The question has arisen whether by virtue of the right of eminent domain, one state can take or subject to public use land in another state, and the decisions have naturally been against such power.' And in *Salisbury Mills* v. *Forsaith,* 57 N. H. 124, the court said: 'It is certain that this act can have no extra-territorial application or effect. The use and management of Massachusetts real estate cannot be subjected to the control of New Hampshire laws.' In the case just cited, a Massachusetts corporation had erected a dam upon its own land in that state, whereby the water of a stream was set back upon the land of a riparian owner in the State of New Hampshire. It was decided that the damages to the land owner in the foreign state could not be assessed under the New Hampshire Act of 1868 for the encouragement of manufacturers, nor could the right of flowage be ascertained and fixed in this way." (Citing *Gould on Waters,* Sec. 242, p. 477.)

Like decisions in similar cases are as follows:

Wooster v. *Great Falls Mfg. Co.,* 39 Me. 246;

Rutz v. *City of St. Louis,* 7 Fed. Repr. 438;

Mannville Co. v. *City of Worcester,* 138 Mass. 89;

Saunders v. *Bluefield Water Works and Imp. Co.,* 58 Fed. Repr. 133;

Farnham on Water and Water Rights, Vol. 1, p. 30.

There is, therefore, no such thing as the power of eminent domain exercisable or effective outside of the territorial limits of the state under whose sovereignty it is exercised.

Flood Waters.

Defendant attempts to justify its proposed diversion on the ground that it will take only the flood waters which it claims now run to waste. That was the claim made in *U. S.* v. *Rio Grande Dam and Irrigation Co., supra,* but it was disregarded by this court. It has no value here.

Flood waters which form a continuous body with the water flowing in the ordinary channel of a stream, even though they depart from such channel and flood adjacent property and return to the stream on the recession of the water, are regarded as a part of the stream and as a part of the flow thereof.

O'Connell v. *E. Tenn., V. & G. R. R. Co.,* 87 Ga. 346. Even where flood waters are considered as surface water, an interference with the right of riparian proprietors to the flow thereof in the exercise of the power of eminent domain is a taking of a property right, and this applies to the taking of flood waters by municipal corporations for public use. *Lewis, Eminent Domain, supra,* Section 89, p. 149.)

Clark v. *Rochester,* 43 Hun. (N. Y.) 271;
Acker v. *Town of Newcastle,* 48 Hun. (N. Y.) 312.

Adequate Remedy at Law.

The answer contends that there exists an adequate remedy at law available to the plaintiff and its citizens, whose property rights may be taken or affected by the proposed diversion of waters. There is no such remedy at law, as is shown by the authorities cited above under *"Eminent Domain."*

The 14th amendment to the Constitution of the United States, which provides "nor shall any state deprive any person of life, liberty or property without due process of law," is nation-wide in its application, and applies to

the present situation. The defendant may, through the power of eminent domain, deprive riparian proprietors in New York State of their legal rights, but not without due process of law and not without compensation, but that power has no effect beyond the State boundary.

But the proposed diversion has no legal warrant. The defendant has no power of eminent domain effective outside of the territorial limits of the State of New York, and the only means of acquiring property or property rights outside New York State, available to it, is by private negotiations or compacts between the states.

Interstate Common Law.

Some of the decisions have referred to what was termed a body of interstate common law.

Sir William Blackstone says that common law consists of,

> "doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is upon common law, for their support."
>
> "• • • For the authority of these maxims rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of common law, is by showing that it hath been always the custom to observe it." (Bl. Com. Introduction p. 68.)

Chancellor Kent says:

> "The common law includes those principles, usages, and rules of action applicable to the government and security of person and property, which do not rest for their authority upon any express and positive declaration of the will of the legislature."
>
> • • • • • • • • • •
>
> "• • • A great proportion of the rules and maxims which constitute the immense code of the common law grew into use by gradual adoption, and received, from time to time, the sanction of the

courts of justice, without any legislative act or interference. It was the application of the dictates of natural justice and of cultivated reason to particular cases. In the just language of Sir Matthew Hale, the common law of England is, 'not the product of the wisdom of some one man, or society of men, in any one age; but of the wisdom, counsel, experience, and observation of many ages of wise and observing men.' "

* * * * * * * * *

"But though the great body of the common law consists of a collection of principles, to be found in the opinions of sages or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts, it is, nevertheless, true, that the common law, so far as it is applicable to our situation and government, has been recognized and adopted, as one entire system, by the constitutions of Massachusetts, New York, New Jersey and Maryland." (I Kent's Com. pp. 471, 472.)

Certainly there is no interstate common law which sanctions the diversion by one state of waters from interstate streams, to the unaltered or undiminished flow of which another state has a legal right.

Common law is formed by the decisions of the courts. There has never been a decision to this effect; hence there is no common law which justifies such a diversion.

The decisions of this Court on the diversion of interstate waters.

In *Kansas v. Colorado,* 206 U. S. 46, the State of Kansas filed a bill to enjoin the State of Colorado from diverting waters in Colorado from the Arkansas river, an interstate stream. Kansas invoked the rule of the common law that owners of lands on banks of a river are entitled to the continual flow of the stream. Colorado insisted upon its right to apply the doctrine of appropriation and use the waters of the river as it saw fit.

While the common law rule applied generally in Kansas, that state conceded that this rule had been modified in the western states so that flowing water might be appropriated to mining purpose and for the reclamation of arid lands, and that the doctrine of prior appropriation obtains (p. 48).

The opinion of the court, delivered by Mr. Justice Brewer, states:

> (p. 95) "But when the states of Kansas and Colorado were admitted into the Union they were admitted with the full powers of local sovereignity which belonged to other states (citing cases) and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purpose of irrigation. Now the question arises between two states, one recognizing generally the common-law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither state can legislate for, or impose its own policy upon the other."
>
> (p. 97) "One cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever, as in the case of Missouri *v.* Illinois, *supra,* the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them.

The court considered the fact that before either of the states involved were settled the Arkansas river was a stream which flowed through arid lands which could be reclaimed only by the application of water. The diversion of water in Colorado was therefore necessary to the use

of the land. This was not true in Kansas. The court held that to impose upon Colorado the common law rule which prevailed in Kansas would have the effect to perpetuate a desert condition in Colorado. The court held that on account of the different rules of law prevailing in the two states and the different physical conditions of the soil, it was required to consider the effect of what had been done upon the respective states,

> (p. 100) "and so adjust the dispute upon the basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream. A little reflection will make this clear. Suppose the controversy was between two individuals, upper and lower riparian owners on a a little stream with rocky bank and rocky bottom. The question properly might be limited to the single one of the diminution of the flow by the upper riparian proprietor. The lower riparian proprietor might insist that he was entitled to the full, undiminished, and unpolluted flow of the water of the stream as it had been wont to run. It would not be a defense on the part of the upper riparian proprietor that, by the use to which he had appropriated the water, he had benefited the lower proprietor, or that the latter had received in any other respects an equivalent. The question would be one of legal right, narrowed to place, amount of flow, and freedom from pollution.
>
> We do not intimate that entirely different considerations obtain in a controversy between two states."

At page 104 the decision continues:

> "As Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state. And this is especially true when the waters are, except for domestic purposes, practically useful only for purposes of irrigation."

The court then goes on to describe the peculiar characteristics of the Arkansas river and says that except for the purposes of irrigation its waters would flow through eastern Colorado and Kansas with comparatively little advantage to either state. The diversion complained of had already been made when the suit was before the court and it refused to interfere with the existing diversion in Colorado for the purpose of irrigation (p. 114).

That decision was predicated upon the facts that the states had different rules—Colorado having the doctrine of appropriation for irrigation purposes and Kansas the common-law rule of riparian proprietorship; that Kansas conceded a modification of the common-law rule to the extent of the appropriation of waters for irrigation; that the waters were useful for no other purpose; and that there was no diversion from one watershed to another.

In the case of *Wyoming* v. *Colorado* (259 U. S. 419), Wyoming brought an action against Colorado to prevent threatened diversion in Colorado of part of the waters of the Laramie river, an interstate, non-navigable stream. Wyoming contended that, without its sanction, waters of an interstate stream could not be taken from one watershed into another where it would never receive any benefit from it. Colorado contended that as a state it had the right to dispose, as it might choose, of any part or all of the waters flowing in the portion of the river within its boundaries, regardless of the injustice that may result to Wyoming and her citizens. It also contended for an equitable division of the waters.

The opinion of this court, delivered by Mr. Justice Van Devanter, reads in part as follows:

> (p. 458) "Turning to the decisions of the courts of last resort in the two states, we learn that the same doctrine respecting the diversion and use of the waters of natural streams has prevailed in both from the beginning, and that each state attributes much of her development and prosperity to the

practical operation of this doctrine. The relevant views of the origin and nature of the doctrine, as shown in these decisions, may be summarized as follows (p. 459): The common-law rule respecting riparian rights in flowing water never obtained in either state. It always was deemed inapplicable to their situation and climatic conditions. The earliest settlers gave effect to a different rule whereby the waters of the streams were regarded as open to appropriation for irrigation, mining and other beneficial purposes. * * * This doctrine of appropriation, prompted by necessity and formulated by custom, received early legislative recognition in both territories and was enforced in their courts. When the states were admitted into the Union, it received further sanction in their constitutions and statutes, and their courts have been uniformly enforcing it."

At p. 464 the court discusses the case of *Kansas* v. *Colorado, supra,* and says:

"As respects the scope and interpretation of the ultimate conclusion in that case it should be observed, first, that the court was there concerned, as it said, with a controversy between two states, 'one recognizing generally the common-law rule of riparian rights' and the other the doctrine of appropriation; secondly, that the diversion complained of was not to a watershed from which none of the water could find its way into the complaining state, but quite to the contrary; and, thirdly, that what the complaining state was seeking was not to prevent a proposed diversion for the benefit of lands as yet unreclaimed, but to interfere with a diversion which had been practiced for years, and under which many thousands of acres of unoccupied and barren lands had been reclaimed and made productive. In these circumstances, * * * the court said: 'it would seem equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation;' * * *. What was there said about 'equality of right' refers, as the opinion shows (p. 97), not to an equal division of the water, but to the equal level or plane on which all the states

> stand, in point of power and right, under our constitutional system.
>
> Like that case, the one now before us presents a controversy over the waters of an interstate stream. But here the controversy is between states in both of which the doctrine of appropriation has prevailed from the time of the first settlements, always has been applied in the same way, and has been recognized and sanctioned by the United States, the owner of the public lands. Here the complaining state is not seeking to impose a policy of her choosing on the other state, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream. * * *. And here the complaining state is not seeking to interfere with a diversion which has long been practiced and under which much reclamation has been effected, but to prevent a proposed diversion for the benefit of lands as yet unreclaimed."

Adopting as its basis the considerations above quoted, the court proceeded to determine as between the parties the proportion of waters to which each of the states was entitled, on the basis of priority of appropriations.

The decision of the Court in *Wisconsin* v. *Illinois* (278 U. S. 367) has an important bearing on this case. Wisconsin and a number of other states bordering on the Great Lakes instituted an original action to restrain the State of Illinois and the Chicago Sanitary District from diverting waters from Lake Michigan. Later New York State filed its suit for the same purpose. Both cases were heard and decided together.

The defendants therein pleaded necessity and a permit from the Secretary of War. They claimed that the health of the people of Chicago depended upon the diversion of enough water to flush the city sewage down the Chicago Drainage Canal in order to avoid pollution of the source of municipal water supply.

This court held that the Secretary of War was authorized by law to permit the diversion of waters for navigation purposes only. It rejected the plea of necessity and granted an injunction, subject only to the determination of when it should become effective.

That case parallels ours in legal principle and in all the essential facts. In both cases a municipal subdivision of a State claiming authority under state statutes, was the offending party. There the District had already made the diversion. Here it is about to be made. There the necessity claimed was to take care of the sewage and protect the water supply of a great city. Here it is to provide an additional water supply. In both cases all the states directly involved had adopted and consistently applied the common law rule of riparian proprietorship. In both cases the diversion is made, or is proposed to be made, within the borders of a state, of interstate waters which otherwise flowed along the shores of the complaining states.

Since the defendant here predicates its right to divert waters, which now flow into an interstate stream, upon the authority claimed by it under the sovereign powers of New York State, let us consider the contentions urged in that case on behalf of that state.

The following are portions of those contentions as summarized by the Reporter at the beginning of the reported decision of this court:

> (p. 371) "The State of New York has the right for itself and in behalf of its citizens to insist that the waters of the Great Lakes-St. Lawrence Waterway flow down to it without diminution by the defendants, under the common law and under the law of riparian rights as it exists in the State of Illinois and in the State of New York.
>
> The acts of the defendants constitute an illegal use of the waters of a natural watercourse, actionable under the Law of Illinois or the law of New York. New York asks the Court to apply the same

rule that the Illinois courts would apply in a similar matter properly before them."

• • • • • • • • • •

(p. 372) "• • • A duty imposed upon a riparian State, either by international law or treaty, to maintain the navigability of an international waterway 'implies an obligation also to check within places subject to the control of such State commission of any acts which, unless restricted, would prove injurious to navigation generally.' *Hyde, Internat. L., paragraph 183.* This obligation would seem to render improper the tolerance of any diversion productive of such an effect even though it should occur at a point where the river ceased to be navigable and lay wholly within the domain of the acquiescent territorial sovereign. An international stream must be considered as a unity rather than from the viewpoint of the selfish needs of a particular State seeking to divert its waters. 'Where a river traverses or serves as the boundary of territories of several States, the existence of the river interest, as such, becomes the more apparent, because of the common concern of all in its welfare.' *Op. Cit., Ib.* This principle seems peculiarly appropriate to the controversy before the Court. *Cf. Farnham, Waters and Water Rights, Vol. 1, paragraph 6.* This principle has the support of the decisions."

• • • • • • • • • •

"The rule that a State may not divert the waters of a natural watercourse to the injury of a downstream State or its citizens has been applied by this Court in interstate controversies where even the great consideration of navigation was lacking.

The State of New York is the owner of the lands under the waters of Lakes Erie and Ontario and the Niagara and St. Lawrence Rivers within its limits (p. 373). It has a property interest in the running water naturally flowing to such lands and its shores on the lakes and rivers of the Great Lakes-St. Lawrence Waterway. When such running water is withheld and permanently diverted into the Mississippi Watershed, the property of the State of New

York is taken, and it is entitled to an injunction. Such a withholding of the running water as the acts of the defendants have caused, violates the rights of the State and its citizens guaranteed by the Constitution.

Neither Congress nor the Secretary of War has been delegated power by the States to permit this diversion for sewage and hydro-electric power development purposes to the detriment of the State of New York, and its citizens, and to the substantial injury of interstate commerce."

* * * * * * * * *

(p. 374) " * * * It is respectfully submitted that the States have not surrendered to the Federal Government the right to permit a diversion from a natural watercourse for the local purposes of a municipality and to the serious injury of a great commerce, merely because, through that injury, navigation is affected."

* * * * * * * * *

"This power of the Federal Government is a trust power for the benefit of navigation. Certainly when all authority is derived from the States, Congress cannot exercise a higher degree of control than they had. For example, both New York and Illinois own lands under the Great Lakes-St. Lawrence Waterway. Yet the courts have determined that neither State may part with such lands (375) under water to such an extent that the right of present, or the opportunity of improving future, navigation is impaired. Grants may be made of lands for the construction of docks and wharves in aid of navigation. *In re Long Sault Development Co.*, 212 N. Y. 1, s. c., 242 U. S. 272.

(p. 315) If the trust in which the State holds the lands under water 'is governmental and can not be alienated,' surely the powers of the Federal Government, which has no property right in the beds or waters of navigable streams, must also and far more clearly be governmental and inalienable.

No question of discretion, however, is really involved in the transfer of these waters to the Missis-

sippi watershed. If Congress should authorize this, or if the permit of the Secretary of War of March 3, 1925, should be held to lawfully permit such a transfer, it would amount to a complete abdication of the governmental control and the trust vested in the Federal Government to preserve, and, if it sees fit, to improve the navigation of the Great Lakes-St. Lawrence Waterway in the interest of the interstate and foreign commerce thereon.

The title of New York and its citizens in the waters, shores and bed of the Great Lakes-St. Lawrence Waterway admittedly is subject to the servitude that the Waterway may be improved by Congress for the benefit of navigation. In some situations, improvements might cause some local or consequential injury to particular property. Beyond this servitude, the State and its citizens have the right to expect and demand the natural and undiminished flow of the watercourse. There is no greater power in Congress, arising from the Commerce Clause, to dispose of the waters of the Great Lakes for the real or fancied benefit of some single section of the Nation, than to dispose of the lands under their navigable waters. Cf. *Pollards' Lessee* v. *Hagan*, 3 How. 212."

The Chief Justice, in delivering the opinion of this court, said:

(p. 418) "It may be that some flow from the lake is necessary to keep up navigation in the Chicago River, which really is part of the Port of Chicago, but that amount is negligible as compared with 8,500 second feet now being diverted. Hence, beyond that negligible quantity the validity of the Secretary's permit derives its support entirely from a situation produced by the Sanitary District in violation of the complainants' rights; and but for that support complainants might properly press for an immediate shutting down by injunction of the diversion, save any small part needed to maintain navigation in the river. In these circumstances we think they are entitled to a decree which will be effective in bringing that violation

and the unwarranted part of the diversion to an end."

(p. 420) "The Sanitary District authorities, relying on the argument with reference to the health of its people, have much too long delayed the needed substitution of suitable sewage plants as a means of avoiding the diversion in the future. Therefore they can not now complain if an immediately heavy burden is placed upon the District because of their attitude and course. * * *"

(p. 421) "Though the restoration of just rights of the complainants will be gradual instead of immediate it must be continuous and as speedy as practicable, and must include everything that is essential to an effective project."

During the argument before the Special Master, on the re-reference, the Attorney-General of New York State said:

"I never could see very much difference between the riparian rights of private parties and the riparian rights of the states in this case. If John Brown dug a ditch from his stream to the stream of Tom Smith and diverted the water from Tom Smith's stream and depleted the water supply for his mill or icepond, it would be a very simple matter. Almost any lawyer could tell him what his rights were. The remedy would be plain and known in every common law jurisdiction in the world, and a decree would follow in terms that everybody understands.

Our Supreme Court, after this long litigation, it seems to me, with all deference to the distinguished counsel who have taken another view, have indicated that this problem is something like the simple problem that I mention.

* * * * * * * * *

* * * "I think we ought to have a decree or a judgment in this court which amounts to something, which would be the kind of a decree or judgment that would enable John Brown to stop Smith

from taking the water that does not belong to him, to his damage."

(Oral argument of Hamilton Ward, in *Wisconsin* v. *Illinois*, October 3, 1929, before Hon. Charles E. Hughes, Special Master, on re-reference by the Court; Stenographer's Minutes, pp. 312, 313).

IV.

Conclusion.

It appears from the record in this case that:

1. Unless restrained, the defendant intends to erect a dam in each of the five tributaries of the Delaware River above mentioned to impound the run-off of 610 square miles of the watershed of the Delaware River, and to "*now*" divert therefrom, for the purpose of human consumption in New York City, and for water power, six hundred million gallons of water daily.

2. The defendant relies, as authority for the erection of said dams and the diversion of said waters, upon the laws of the State of New York.

3. That Delaware River, and each of the five tributaries thereof in question, are navigable waters of the United States and the erection of said dams cannot be constructed without the consent of Congress and the approval of the plans therefor by the Chief of Engineers and the Secretary of War, within the meaning of Section 401, Title 33, U. S. C. A. p. 377.

4. That said dams will constitute obstructions to the navigable capacity of the Delaware River and the tributaries in question, as waters of the United States, and will impair the navigable capacity of said river and tributaries; that said dams are proposed to be constructed, and said water is proposed to be diverted, without the affirmative authority of Congress, and without the plans for said dams having been recommended by the Chief of

Engineers and authorized or approved by the Secretary of War; and that said dams will alter or modify the course, condition, capacity or channel of navigable waters of the United States, without the work being recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning thereof, within the meaning of Section 403, Title 33, U. S. C. A. p. 397.

5. That, unless restrained, defendant intends to divert said waters from one watershed to another, where the plaintiff can never receive any benefit therefrom, without the consent of the plaintiff or its citizens who are riparian proprietors along the Delaware River below the point of diversion.

6. That the proposed diversion of waters will violate the common-law rights of the plaintiff and its citizens as riparian owners along the Delaware River below the point of diversion.

For the foregoing reasons it is respectfully submitted that a writ of injunction should issue perpetually restraining and enjoining the defendant in accordance with the prayer of the complaint.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. [redacted]riginal[redacted] 9 [redacted] 48

STATE OF NEW JERSEY,

Plaintiff,

vs.

STATE OF NEW YORK and CITY OF NEW YORK,

Defendant.

BOOK OF APPENDICES TO BRIEF FOR PLAINTIFF.

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INDEX

PAGE

Appendix A. Laws of New Jersey. An Act to preserve the free navigation of the river Delaware, near the head of the tide waters thereof. Passed February 9, 1815 (R. S. 546)..... 1

Appendix B. Laws of New Jersey. An Act to prevent obstructions to the navigation of the river Delaware. Passed March 1, 1820 (R. S. 547)..... 3

Appendix C. Laws of New Jersey. An Act authorizing Edward Clark and his associates to navigate the river Delaware. Passed December 5, 1823..... 4

Appendix D. Laws of New Jersey. Resolution concerning a wing dam erected at or near to "Wells' Falls," in the river Delaware, on the Pennsylvania side of the said river, in the vicinity of the Town of New Hope. Resolution passed December 2, 1831..... 6

Appendix E. Laws of New Jersey. An Act to authorize the removal of certain obstructions to the navigation of the river Delaware. Passed February 26, 1834..... 7

Appendix F. Laws of New Jersey. Supplement to an act to authorize the governor of this state to incorporate a company for erecting a bridge over the river Delaware, near the town of Milford, in the county of Wayne, passed the twenty-seventh day of January, one thousand eight hundred and fourteen. Approved March 1, 1851..... 8

PAGE

Appendix G. Laws of Pennsylvania, Vol. I, p. 513. Chap. DCXXVI. An Act declaring the rivers Delaware and Lehigh, and parts of Neshaminey creek, as far as Barnsley's ford, and of the stream called Lechawaxin, as far as the falls thereof, common highways, and for improving the navigation in the said rivers. Passed March 9, 1771..... 10

Appendix H. Laws of Pennsylvania, Vol. III, p. 380. Chap. MCCCCXXXV. An Act to appropriate the sum of five thousand pounds annually, for the purposes therein mentioned. Passed September 28, 1789..... 14

Appendix I. Laws of New York, 1816, page 174. Chap. CLXI. An Act declaring the Neversink River a public highway, and for other purposes. Passed April 16, 1816..... 17

Appendix J. Laws of New York, 1817, page 121. Chap. CXXIX. An Act declaring certain waters in Sullivan County public highways. Passed March 28, 1817..... 23

Appendix K. Laws of New York, 1822, page 195. Chap. CXCV. An Act declaring the Delaware River and its branches, public highways. Passed April 12, 1822..... 24

Appendix L. Consolidated Complaint and Answer... 26

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 17, Original.

STATE OF NEW JERSEY,
Plaintiff,

vs.

STATE OF NEW YORK AND CITY OF NEW YORK,
Defendant.

APPENDICES TO BRIEF FOR PLAINTIFF

Appendix "A"

Laws of New Jersey.

"An Act to preserve the free navigation of the river Delaware, near the head of the tide waters thereof. Passed February 9, 1815 (R. S. 546).

6. Sec. 1. From and after the first day of May next, it shall not be lawful for any schooner, sloop, shallop, or other vessel, to ride at anchor in the channel of the river, at any place between Lamberton and the head of the sloop navigation at Bloomsbury, so as in any way to impede, obstruct, or endanger the free navigation of all vessels, coming to or departing from any of the landings or wharves, situated at the two places above mentioned; and all such schooners, sloops, shallops, or other vessels which ride at anchor, are required so to arrange themselves on each side of the river, as at all times to leave a space of not less than two hundred feet of the said channel open and clear

for the free ingress and regress of all vessels plying to or from any of the said landings or wharves; and the captain, master, owner, or other person having the command of any such schooner, sloop, shallop, or other vessel, who shall wilfully contravene the provisions of this act, by continuing to ride at anchor in any part of the said channel, so required to be left free and open, when he might have with safety removed from the same, shall forfeit and pay, for each and every such offence, the sum of ten dollars to be prosecuted for and recovered by action of debts, before any justice of the peace, with costs of suit, by any person or persons who may think themselves aggrieved thereby, the one half to the use of the poor of the township of Nottingham, and the other half to the use of the person or persons who shall sue for and prosecute the same to effect.

7. Sec. 2. *And whereas*, it has been represented, that the persons on board of certain vessels employed in the collection and transporting of paving stones, are in the practice of throwing overboard into the river such irregular or offal stones as are not deemed fit for the purposes of paving, thereby obstructing and filling up from time to time the bed of the river; for remedy whereof—*be it further enacted*, that such practice is hereby declared injurious and unlawful, and all and every person or persons, who shall hereafter be guilty of throwing overboard into the river, stones, gravel, sand, or any other substance which may have a tendency to fill up the bed of the said river, and shall be convicted thereof, shall forfeit and pay for each and every such offence the sum of twenty-five dollars, to be prosecuted for, recovered and applied, as is directed in the preceding section.

8. Sec. 3. It shall be the duty of every justice of the peace, upon his own view, or the representation or information of any person on oath or affirmation, to issue his warrant to one or more constable or constables in his

county, commanding him or them to require such and so many persons as he or they shall deem necessary, to aid and assist him or them in apprehending every person offending against the provisions contained in the preceding sections, and forthwith to bring such offender, when apprehended, before the said justice, or any other justice of the peace, to be proceeded against in the manner herein before directed; *provided*, that this act shall not extend to impair or in any way infringe on the mutual arrangements entered into by this state and the state of Pennsylvania." (Nixon's Digest, p. 532.)

Appendix "B"

Laws of New Jersey.

"An Act to prevent obstructions to the navigation of the river Delaware. Passed March 1, 1820. (R. S. 547.)

9. No bridge, floating stage, or other device in the nature of a bridge, no dam, wing, or other device, creating, drawing off, or using a water power, or taking fish, shall hereafter be erected, placed or dug in any part of the river Delaware, between New Jersey and Pennsylvania, without a view first had by three skilful and respectable freeholders in each state, residing near the spot where it may be intended to erect such bridge, stage, dam, wing or device, appointed by the court of quarter sessions, and a specific report by them or a majority of them, respectively, in each state, to the court of quarter sessions of the county by whom appointed, showing distinctly the bridge, stage, dam, wing or device intended, and stating that it will not impede or injure the navigation of the said river, and such report being approved of and confirmed by each court of quarter sessions, and unappealed from to the supreme court of either state, during one year after it

shall have been so approved of, shall be final; but if on such appeal the supreme court of either state should reverse such approval and confirmation, the same shall be set aside; and any person or persons offending against the provisions of this act shall, on conviction thereof, before the court of quarter sessions of the next adjoining county, forfeit and pay for each offence, such sum, not less than five hundred not more than one thousand dollars, as such court shall adjudge, one half to the informer or informers and the other half to the use of the poor of the proper county." (Nixon's Digest, p. 533.)

Appendix "C"

Laws of New Jersey.

An Act authorizing Edward Clark and his associates to navigate the river Delaware.

1. Be It Enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That it shall and may be lawful to and for Edward Clark, of the City of Philadelphia, state of Pennsylvania, and his associates, his or their heirs, assigns, or successors, to proceed forthwith, or as soon as he or they may deem it fit and convenient, to navigate any or all of the rapids in the river Delaware, between the bridge at Bloomsbury and the north-west corner of this state, as bounded by said river, conformable to his plan, wherein the agency of the current is made to operate on water or paddle wheels and other apparatus, so as to propel boats against rapids, and to exact and receive such compensation therefor, through such collectors as may be appointed for that purpose, as he or they may deem suitable and just: *Provided*, that the choice between his mode of propelling or towing boats, and that

at present practised, shall continue to be optional to those concerned or engaged in the navigation of said river: *And provided also,* that this act shall not be construed as affecting, in any manner, the rights and privileges of this state, as connected with the improvement of the navigation of said river, on any plan differing from the aforesaid.

2. *And be it enacted,* That if any person or persons shall wilfully and knowingly do any act or thing by which the mode of navigation aforesaid shall be impeded, or any boat, cable, machine, or property thereunto belonging, shall be injured or destroyed, he, she, or they so offending shall forfeit and pay to the said Edward Clark and his associates, his or their heirs, assigns, or successors, or to his or their collector or collectors, fifty dollars, together with the amount of damages by him or them sustained, and legal costs of prosecution; to be recovered by action of debt, before a justice of the peace, or any court of competent jurisdiction.

3. *And be it enacted,* That this act shall not become a law until the legislature of the state of Pennsylvania shall pass an act granting similar privileges herewith to the said Edward Clark and his associates, his or their heirs, assigns, or successors, or to a company organized in his or their stead.

4. *And be it enacted,* That nothing in this act shall prevent the legislature from the repeal or modification of the same, at their pleasure.

C. Passed December 5, 1823.

Appendix "D"

Laws of New Jersey.

WHEREAS it has been represented to the legislature of the state of New Jersey, that a wing dam has been recently erected at or near to "Wells' Falls," in the river Delaware, on the Pennsylvania side of the said river, in the vicinity of the town of New Hope, which materially interferes with, and obstructs the free navigation thereof, causing thereby great inconvenience, loss and damage, to the citizens of this state, and others navigating said river: AND WHEREAS aid and relief have been prayed of this legislature by petition—Therefore,

RESOLVED, *by the Council and General Assembly of the state of New Jersey,* That the Governor of this state be, and he is hereby authorized and requested, to ascertain without delay, in such manner as he may deem expedient, either by agent or agents, or otherwise, neither any wing or other dam has recently been built and erected at or near to Wells' Falls, in the river Delaware, on the Pennsylvania shore thereof, near to the town of New Hope; and if so, whether it does now, or from its location and dimensions may probably hereafter materially interfere with, and obstruct the free navigation of the said river; and that he further ascertain, in manner aforesaid, by whom, and by what authority, and for what purpose, said dam has been erected.

RESOLVED FURTHER, That if it should appear to the Governor from the information he may obtain under the preceding resolution, that the said wing or other dam has been built at or near the place aforesaid, and that it now does, or probably will hereafter, materially obstruct the free navigation of the said river Delaware, that then, and in that case, he do, without delay, call the attention of the Executive of the State of Pennsylvania to the

subject, and request his co-operation in removing said obstruction; and that he do use any and every other means within his power, under the existing laws of this state, and treaties with Pennsylvania, to have said dam removed and abated as a nuisance.

Passed, December 2, 1831.

Appendix "E"

Laws of New Jersey.

An Act to authorize the removal of certain obstructions to the navigation of the river Delaware.

WHEREAS, it is represented, that certain obstructions have recently been placed in the river Delaware, at Scudder's Falls, which obstruct the navigation of said river, are productive of great loss and damage to the citizens of this state, and ought to be summarily removed—Therefore,

Sec. 1. BE IT ENACTED *by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same,* That Enoch Green, and Philip Fine, Jun. of the county of Warren, and Cornelius Ludlow, of the county of Hunterdon, be, and are hereby authorized and empowered, with all necessary workmen and implements, to remove and clear out said obstructions so that the natural navigation of said river may be restored at the falls aforesaid.

Sec. 2. *And be it enacted,* That said commissioners shall keep a just and true statement of the expenses, incurred under the authority of this act, and transmit the same, under oath or affirmation, to the governor of this state, for the time being, who shall issue a warrant to the treasurer of the state, for the payment of the same,

provided the amount thereof shall not exceed three hundred dollars.

Sec. 5. *And be it enacted,* That nothing in this act shall be construed to interfere with the chartered rights of the Trenton Delaware Falls Company, or any other incorporated company, or to authorize said commissioners to remove any of the property or works of said company or companies, which do not impede the passage of rafts or loaded boats.

Passed February 26, 1834.

Appendix "F"

Laws of New Jersey.

Supplement to an act to authorize the governor of this state to incorporate a company for erecting a bridge over the river Delaware, near the town of Milford, in the county of Wayne, passed the twenty-seventh day of January, one thousand eight hundred and fourteen.

WHEREAS the bridge erected by the company, incorporated by the act to which this is a supplement, was carried away by a freshet, and entirely lost; and whereas the said company have since that time collected all their assets, and, being unable to rebuild said bridge, have made a distribution to and among the stockholders; and whereas the stock of said bridge is much scattered, and some of the stockholders cannot be consulted, and others of them are incapable of acting, and it is desirable that said bridge should be again erected—therefore,

1. BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey,* That the said president, man-

agers, and company be, and they are hereby authorized to issue new stock, to an amount sufficient to rebuild said bridge; *provided,* that in rebuilding said bridge, it shall be so constructed as not to interfere with, or impede the navigation of the river.

2. *And be it enacted,* That when said new stock shall be subscribed, and such parts of it be paid as may be agreed upon and be necessary, the said new stockholders shall be deemed to be the only stockholders of said bridge; *provided,* that said president, managers, and company shall give public notice, for at least one month, in one of the newspapers published in the county of Sussex, of the time when and places where they will receive subscriptions for the said new stock; *and provided also,* that the present stockholders, or any of them, shall have a right to subscribe for the amount of stock now held by them, if they desire so to do, in preference to any other persons.

3. *And be it enacted,* That this act shall take effect immediately, and the said corporation shall have all the powers and privileges, and be subject to the restrictions, limitations, and conditions specified and contained in the act entitled, 'An act concerning corporations,' approved February fourteenth, one thousand eight hundred and forty-six, so far as the same are applicable thereto.

Approved March 1, 1851."

Appendix "G"

Laws of Pennsylvania, Vol. I, p. 513.

CHAPTER DCXXVI.

An Act declaring the rivers Delaware and Lehigh, and parts of Neshaminey creek, as far as Barnsley's ford, and of the stream called Lechawaxin, as far as the falls thereof, common highways, and for improving the navigation in the said rivers. (m)

WHEREAS the improving the navigation in rivers is of great importance to trade and commerce: And whereas the rivers Delaware and Lehigh may be rendered much more navigable than they now are: And whereas many persons, desirous to promote the public welfare, have subscribed large sums of money for the purposes aforesaid, and it is represented to the assembly of this province, that more considerable sums would be contributed for the same purposes if commissioners were appointed by law to receive such subscriptions, and duly to apply them: *Be it therefore enacted*, That the rivers Delaware and Lehigh and parts of Neshaminey creek, as far up as Barnsley's ford, and no further, and the stream called Lechawaxin, as far up as the falls thereof, be, and they are hereby declared to be, common highways, for the purposes of navigation up and down the same.

II. *And be it further enacted*, That Joseph Galloway, Joseph Fox, Michael Hillegas, Abel James, Samuel Rhoads, James Allen, Peter Knight, Esquires; Daniel Williams, Henry Drinker, Clement Biddle, Jeremiah Warder,

(m) For all the laws respecting the Delaware, &c., see the proper title in the index to this edition.

The jurisdiction of the islands in the Delaware is regulated, 2nd vol., chap. 1024; 3rd vol., chap. 1234.

The river Delaware is within admiralty jurisdiction. Dallas's Reports, page 49.

the younger, Jacob Bright, John Baldwin, Richard Wells, gentlemen; Thomas Yardley, Adam Hoops, Jacob Orndt, Peter Kechline, Henry Kooken, Esquires; William Ledley, Nicholas Depui, son of Samuel, Jacob Stroud, and John Arbo, gentlemen, be, and they are hereby appointed and constituted commissioners, for improving the navigation in the said rivers Delaware and Lehigh; who, or a majority of whom, the survivors or a majority of such survivors, shall have full power and authority, by virtue hereof, to collect, recover and receive, from any person or persons whatsoever, all such sums of money, which have been or shall be given or subscribed for rendering the said rivers more navigable; and so much of the said monies as may be necessary for that purpose to lay out and apply, for and towards improving the navigation in the said river Delaware, from the lower part of the falls near Trenton, to the forks thereof at Easton; and the residue thereof to lay out and apply, for and towards improving the navigation in that part of the said river called the Eastern or Main Branch; and in the said river Lehigh, in proportion respectively to the sums subscribed by the inhabitants of Pennsylvania and New Jersey, residing near the said Eastern Branch, and by the inhabitants of this province, residing near the said river Lehigh: *Provided always,* That such sums of money as have been or shall be given or subscribed, for the improving the navigation in either of the said rivers, above the forks aforesaid, separately, shall be laid out and applied for and towards that purpose, and no other.

III. *And be it further enacted,* That the said commissioners, or a majority of them, their survivors, or a majority of such survivors, shall have full power and authority, by themselves, their agents, servants and workmen, to clear, scour, open, enlarge, straiten or deepen the said rivers, wherever it shall to them appear useful

for improving the channels; and also to remove any obstructions whatsoever, either natural or artificial, which may or can in any manner hinder or impede the navigation in the said rivers, or either of them, to make and set up in the said rivers, or either of them any dams, pens for water-locks, or any other works whatsoever, and the same to alter or repair, as they shall think fit; and also to appoint, set out and make, near each or either of the said rivers, paths or ways, which shall be free and open for all persons having occasion to use the same, for towing, hauling or drawing any vessels, boats, small craft, and rafts of any kind whatsoever, and from time to time to do and execute every other matter or thing, necessary or convenient for improving the navigation in the said rivers, or either of them. *Provided always,* That no dam, pen, lock or other work, made or set up by the said commissioners, shall be appropriated to the private use or benefit of any person or persons whatsoever.

IV. *And be it further enacted,* That no person or persons whatsoever shall presume to divert, lead or draw, at any time or times, by any race or other device, any water of the said rivers, or either of them, out of or from the natural course or channel for the use of any mill or water-work.

V. *And be it further enacted,* That if any person or persons shall presume to oppose or hinder the said commissioners, or any of them, their agents, servants and workmen, or any of them, from doing any act which they are hereby authorized and empowered to do; or shall make, erect, set up, repair or maintain, or shall be aiding, assisting or abetting in making, erecting, setting up, repairing or maintaining any dam or obstruction, which may or can in any manner hinder or impede the navigation of the said rivers, or either of them; or shall remove, destroy, throw down, alter, injure or impair any

dam, pen, lock or other work, made or set up by the said Commissioners, or by order of them, or a majority of them, their survivors, or a majority of such survivors, every person so offending, being legally convicted thereof, by verdict of a jury, or by his own confession before the Justices of the Peace in their Court of General Quarter Sessions, shall forfeit and pay fifty pounds, lawful money of this province, for every such offense, or shall suffer imprisonment for twelve months, without bail or main-prize; one moiety of which forfeiture shall be paid to the informer, and the other moiety to the Commissioners herein appointed, or the survivors of them, as aforesaid, to be applied for and towards improving the navigation in the said rivers.

VI. And whereas doubts may arise in what counties offenses committed in the said river Delaware against this act ought to be tried: For removing thereof, *Be it enacted,* That every offense committed in the said river against this act shall be said to be committed, and may be tried and determined as aforesaid, in any of the counties within this province, opposite to or adjoining on that part of the said river, in which such offense shall be committed.

VII. *Provided always, and be it further enacted,* That nothing herein contained shall give any power or authority to the Commissioners herein appointed, or any of them, to remove, throw down, lower, impair, or in any manner to alter a mill-dam erected by Adam Hoops, Esq. in the said river Delaware, between his plantation and an island in the said river, nearly opposite to Trenton; or any mill-dam erected by any other person or persons in the said river, before the passing of this act, nor to obstruct, or in any manner to hinder the said Adam Hoops, or such other person or persons, his or their heirs and assigns, from maintaining, raising or repairing

the said dams respectively, or from taking water out of the said river, for the use of the said mills and water-works, erected as aforesaid, and none other.

VIII. *And be it further enacted,* That the said Commissioners shall keep minutes of their proceedings, in pursuance of the power hereby given to them, fairly entered in a book, and shall, once in every year, make report of their transactions in improving the navigation in the said rivers, to the Assembly of this province for the time being, and shall lay before them a just and faithful account of all sums of money by them received for the aforesaid purposes, and in what manner they shall be expended, that the same may be adjusted and settled.

Passed 9th March, 1771. Recorded A. vol. V., page 401.

Appendix "H"

Laws of Pennsylvania, Vol. III, p. 380.

CHAPTER MCCCCXXXV.

An Act to appropriate the sum of five thousand pounds annually, for the purposes therein mentioned.

Sect. I. THIS House having set apart, out of the aggregate funds of the state, the sum of ten thousand pounds annually, for the purposes mentioned in an act, entitled "An Act to appropriate divers funds accruing and growing due to this commonwealth towards the payment of the expences of government, and to provide a fund for other purposes," but no specified designation of the particular parts of the said sum, having been made, declarative of the special purpose to which such parts shall be exclusively applied; and it being necessary to make such designation, as well to prevent disorders in accounts, as to preserve a

due regard to the objects of the appropriation, so that one shall not be injured or neglected, while the monies are applied to others; and it being of the highest consequence to the prosperity of this commonwealth, that the transportation of produce, commodities and merchandise, should by every practicable means, be facilitated, by an attention to the improvement of roads and inland navigation, and as it is the truest economy to provide money to pay all expences incurred on this account, so that no difficulties may occur in payments, delays in such cases raising prices, and obstructing the execution of measures: (e)

Sect. II. *Be it enacted, and it is hereby enacted by the Representatives of the Freemen of the commonwealth of Pennsylvania, in General Assembly met, and by the authority of the same.* That the Treasurer of this state be, and he is hereby, directed and enjoined, yearly and every year, to set apart the sum of five thousand pounds, part of the sum of ten thousand pounds appropriated by an act, entitled "An Act to appropriate divers funds accruing and growing due to this commonwealth towards the payment of the expences of government, and to provide a fund for other purposes," for claims and improvements; and the said Treasurer shall keep a distinct account of this fund, and always take care that so much be reserved in his hands, ready to answer all drafts directed by law to be drawn for the purposes of roads and navigation, to which it is hereby solely and exclusively appropriated. And that in the first instance a sum, part of the said sum hereby appropriated, not exceeding twenty-five hundred pounds, shall be expended and laid out, under the direction of Council, for clearing and making navigable such parts of the river Susquehanna, above Wright's ferry, and the

(e) For the law referred to in the preamble, see ant. chap. 1393 and see the notes subjoined to that act. The general acts for improving the roads and rivers of the state were passed on the 13th of April, 1791, and the 10th of April, 1792.

Juniata, and their waters, as the Supreme Executive Council shall judge most proper and necessary; the sum of one thousand pounds, under the like circumstances, for clearing and making navigable the Schuylkill, and its waters; and the sum of fifteen hundred pounds, under the like circumstances and direction, for clearing and making navigable the Delaware, Lehigh and their waters.

Sect. III. And whereas the time for which the members of this House are elected is so nearly expired, that it is impracticable to mature and finally enact any proper system on a subject so important: But, to the end that sufficient information may be possessed by the succeeding House of Assembly on this subject, *Be it enacted by the authority aforesaid,* That the Supreme Executive Council be, and they are hereby authorized and empowered to appoint a sufficient number of ingenious and discreet persons commissioners, to view the navigable waters in this state, confining their investigations, in the first instances, to those of the Delaware, Schuylkill and Susquehanna, and the various streams running into the said rivers, respectively, or capable of being connected therewith, marking places where locks or canals are necessary, the distances between the waters capable of navigation, all falls, obstructions, and all other matters and things requisite and necessary, as well for the information of the Assembly of this state, as to enable them to form and enact a proper law on the subject, and to afford materials, plans, maps and estimates, for facilitating the execution of the important design herein mentioned. And the said commissioners, or any convenient number of them, at the direction of the Supreme Executive Council, shall also view such and so many of the roads and highways already laid out within this commonwealth, or the places and parts of the state through which roads generally useful should pass, having regard to the general purposes of commerce and

transportation most interesting to the state at large, and pointing out the necessary improvements in the said roads already laid out, and also such others as may be deemed requisite for the purposes aforesaid, noting everything properly falling under the subject, and returning their plans, estimates, maps and observations, to the Supreme Executive Council, to be laid before the General Assembly of this commonwealth. And the Supreme Executive Council are hereby authorized and empowered to give such instructions to the said commissioners, as they shall deem necessary for effectuating the purposes aforesaid. And the Supreme Executive Council are hereby authorized and empowered to draw orders, from time to time, for the monies, as appropriated herein or any part or parts thereof, on the Treasurer of this state, for the time being, for the purposes herein directed, and no other.

Passed 28th September, 1789.

Appendix "I"

(Laws of New York, 1816, page 174.)

CHAP. CLXI.

An Act declaring the Neversink River a public highway, and for other purposes.

Passed April 16, 1816.

WHEREAS it is represented to the Legislature, that there are, adjacent to the banks of the Neversink river, in the counties of Orange and Sullivan, large quantities of valuable timber, which the inhabitants, on clearing their lands, are under the necessity of burning or otherwise destroying; and that by removing many of the rocks and other obstructions, and cutting through some adjoining points of land, it is practicable to render the said river

passable for rafts of lumber, &c. from the mills of Thomas S. Lockwood, at a place called the Neversink falls, in the town of Thompson, in the said county of Sullivan, to its intersection with the Delaware river, which would greatly promote the convenience and prosperity of a very considerable portion of the citizens of this State; And whereas certain persons have prayed that that part of the said Neversink river above described, shall be by law declared a public highway and for an act of incorporation to enable themselves and associates to improve the navigation thereof in manner as aforesaid: Therefore,

I. Be it enacted by the people of the State of New York, represented in Senate and Assembly, That the said Neversink river, from the mills of Thomas S. Lockwood, aforesaid, to its junction with the Delaware river, be and the same is hereby declared a public highway subject however, to the regulations, restriction and grants hereinafter contained.

II. And be it further enacted, That Otto William Van Tuyl, Jabez Wakeman, Daniel Clark, William W. Sacket, Richard R. Vooris, Jabez Wakeman, jun. Samuel F. Jones, John Knapp, George A. Wakeman, Alexander Ketchum, George Vaughn, and such other persons as shall associate with them for that purpose, shall be and are collected hereby and made a body corporate and politic, in fact and in name, by the name of "the President and Directors of the Neversink Navigation Company"; and by that name, they and successors shall and may have perpetual succession, and shall be persons in law capable of suing and being sued, pleading and being impleaded, answering and being answered unto; defending and being defended, in all courts and places whatsoever for the purpose of opening and improving that part of the Neversink River, hereinbefore described, in such manner as to render the

same passable for rafts of lumber; and that they and their successors may have a common seal and may change and alter the same at pleasure, and also that they and their successors, by the same name, shall be in law capable of purchasing, holding and conveying any estate, real or personal, for the use of said corporation.

* * * * * * *

VI. And be it further enacted, That, said president directors and company shall have full power and lawful authority, to clear and remove all obstructions in that part of the said Neversink river, by this act declared a public highway and make and render that part thereof passable for rafts so that they may pass thereon with safety and for the purpose of doing which, it shall be lawful for the said president, directors and company, their agents or servants, to pass or repass on any of the lands contiguous thereto, with their carriages, teams, tools and implements, and to take and carry away, off and from any such lands, such timber and other materials as shall be necessary to accomplish the object of this institution; and also, the better to facilitate the said object, it shall and may be lawful for the said president, directors and company to cut through such adjoining necks of land as to them shall appear necessary, and for that purpose to enter on such lands with their agents, servants, teams, tools and implements; and those parts of said river, when so altered as to be covered with water, shall be considered as forming a part of said public highway.

* * * * * * *

VII. And be it further enacted, That any person or persons owning or occupying lands on the banks of said river declared a public highway as aforesaid may erect as many dams as he or they shall deem proper across the said river: Provided, they shall so construct the said

dam or dams with a good and sufficient apron to each on a descent of not more than twenty degrees, constructed as follows, to wit; a space shall be left for that purpose in the top of any such dam not more than forty nor less than thirty feet wide, two feet lower than other parts of any such dam, in such part of such dam as shall be most convenient for the passing of rafts: on the event of any such dam or dams or the apron or aprons thereof breaking away, or any part thereof so as to render it unsafe for the passing of rafts, then it shall be lawful for the said president and directors, their agents and servants, to remove any such obstruction or obstructions so that rafts may pass with safety doing as little other damage to said dam or dams, or other words thereunto applying, as the nature of the case will admit of.

VIII. And be it further enacted, That the said president, directors and company are hereby authorized to make, construct and affix good and sufficient aprons on and so otherwise alter any dam or dams, nor on or across said river, so as to render it safe for rafts to pass thereon, the damage, thereof if any, to be ascertained and paid in manner herein described relative to lands and materials.

IX. And be it further enacted, That, whenever the said president and directors shall have made the aforesaid part of said river navigable for rafts within the meaning of this act, it shall be their duty to apply to one of the judges of the court of common pleas of the county of Sullivan, who shall thereupon appoint by warrant under his hand and seal, three commissioners, being freeholders and citizens of said county, whose duty it shall be on notice thereof, to inspect said rivers; and if they or any two of them shall be of opinion that the aforesaid part of said river is passable for rafts, within the true intent and meaning of this act, that they or any two of

them shall thereupon certify the same, under their hands and seals, and deliver such certificate to the said president and directors, who shall cause the same to be filed in the office of the clerk of the county of Sullivan.

X. Be it further enacted by the authority aforesaid, That from and after the filing of the said certificate in the office aforesaid, it shall and may be lawful for the said president, directors and company, to demand, collect and receive the following rates of toll on all lumber transported or passing along that part of said river herein declared a public highway, or any part thereof, from the owner or owners of any such lumber, or of any person or persons having the same in charge, to wit: For every thousand feet of pine or other boards or plank, one dollar and fifty cents (hemlock and cherry excepted); for every thousand feet of cherry boards and plank; two dollars; for every thousand feet of hemlock boards or plank, one dollar; for every thousand feet of maple or other hardwood, sawed, one dollar and fifty cents; for every thousand feet of pine scantling or square timber, one dollar; for every thousand feet of hardwood, hewed, one dollar; for every thousand feet of hemlock scantling, square timber, seventy-five cents; for every thousand feet of solid timber or scantling, of wood not hereinbefore mentioned, one dollar: (The above rates of toll to be calculated inch board measure;) For every hemlock log twelve feet long or under ten cents, so in proportion for a greater length; for other logs of any description, (like length) fifteen cents; and so in proportion for a greater length; for every thousand eighteen-inch shingle, fifty cents; for every thousand twenty-seven-inch shingles, one dollar and fifty cents; for every cord of bark, fifty cents; for every thousand barrel staves, one dollar; for every thousand hogshead staves, one dollar and fifty cents; for every thousand pipe staves; two dollars; all other kinds of

lumber in like proportion according to its weight and value.

XI. And be it further enacted, That it shall be lawful for the said president and directors to appoint one or more agents or toll gatherers, adjacent to the said river, to demand and receive the said tolls above granted: And further, That if any person or persons shall run or attempt to run any lumber on or along the aforesaid part of said river or any part thereof, without having paid to the said agents, or one of them, the amount of the tolls above granted, or shall turn any kind of lumber adrift on said part of said river apparently for the avoidance of tolls, or shall in any case render a false account of the quantity of lumber contained in any such raft, such person or persons shall be liable to pay to the said president, directors and company four times the amount of the tolls that might otherwise have been demanded in such lumber to be recovered in an action on the case, the cost of suit, before any court having cognizance thereof, of the owner or owners, or of any other person aiding and assisting in running such lumber, contrary to the true intent and meaning of this act: Provided however, That nothing herein contained shall be so construed as to prevent any person or persons from conveying any log or logs on or along said river, to any mill northwardly of the mouth of a stream called Bush-kill for the purpose of sawing; And also, That nothing herein contained shall authorize the said president, directors and company to demand or receive any toll on any raft or lumber coming into the river below the mouth of Basher-kill.

* * * * * * *

XIII. And be it further enacted, That if any person or persons shall obstruct or injure the navigation of that part of the said Neversink River, hereby declared a public highway in any manner whatsoever, such person or

persons shal forfeit, and pay the sum of ten dollars for each and every offence to be recovered with costs of suit, in an action of debt or otherwise, for the use of said company.

* * * * * * *

XV. And be it further enacted, That this act and the privileges, tolls and emoluments, hereby intended to be granted to the said corporation, shall continue in force twenty-five years, from and after the passing of this act.

XVI. And be it further enacted, That this act be, and is hereby declared a public act, that the same be construed, in all courts and places whatsoever beningly and favorably for every beneficial purpose therein intended.

Appendix "J"

(Laws of New York, 1817, page 121.)

CHAP. CXXIX.

An Act declaring certain waters in Sullivan County public highways.

Passed March 28, 1817.

I. Be it enacted by the people of the State of New York, represented in Senate and Assembly, That the stream of water, situate in the county of Sullivan, in this state, and usually called the Beaverkill, shall, from and after the passing of this act, be a public highway, from the Delaware river and up the same to the intersection of the Willewemack and little Beaverkill: Provided that the owners of the adjoining lands may erect mills or other water works, storehouses or docks, on the said waters, so that the same shall not obstruct the navigation thereof:

And provided further, that nothing herein contained shall be construed to abridge any pre-existing private rights.

II. And be it further enacted, That, if any person shall hereafter obstruct the navigation of the said highway, every such offender shall forfeit, for each offence, the sum of five dollars; and for the continuance of such obstruction for every twenty-four hours, one dollar, to be recovered, with costs of suit, by action of debt, by any person who will sue for the same, before any justice of the peace, for the use of the poor of the town where the offence shall be committed; and every such offender shall also be deemed guilty of a misdemeanor, and may be prosecuted by indictment, and on conviction may be imprisoned not to exceed sixty days.

Appendix "K"

(Laws of New York, 1822, page 195.)

CHAP. CXCV.

An Act declaring the Delaware River and its Branches, Public Highways.

Passed April 12, 1822.

I. Be it enacted by the Peoople of the State of New York, represented in Senate and Assembly, That all that part of the Delaware river, from Carpenter's point, near the north boundary of the state of New Jersey, to the northerly boundary of the town of Delhi, in the county of Delaware, and also all that part of the east branch of the said river, from the forks where it forms a junction with the west branch in the town of Hancock to the farm of Frederick Kittle, in the town of Middletown, in said county; and all that part of the Beaver kill (a stream

tributary to the said east branch), which is within the said county of Delaware, be, and the same are hereby declared each to be a public highway: Provided That nothing herein contained shall be construed to prevent any person or persons from erecting, keeping and maintaining, over, on, or across the said west and east branches of the said river, and the said Beaver kill, any bridges, mill dams, water fences, or eel weirs, to be erected or constructed in such manner as in no wise to interrupt or materially injure the free navigation of the waters of the said streams with rafts or lumber, in time of an ordinary freshet, for running lumber.

II. And be it further enacted, That it shall be lawful for any person or persons, by and under the authority of the State of Pennsylvania, to improve the navigation of the said river, so far as the same, or the westerly shore thereof, is the boundary line between this State and the said State of Pennsylvania: Provided, That nothing contained in this section shall be construed to affect the rights of any person or body corporate, nor the jurisdiction of this State.

Appendix "L"

Consolidated Bill of Complaint and Amended Answer.

Complaint.

I.

1. Plaintiff is a State, having its Capital and seat of government at the City of Trenton, Mercer County, New Jersey, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits under and by virtue of its constitution, including the power and duty to protect and preserve to its citizens certain natural and inalienable rights, including the acquisition, possession and protection of property. This suit is instituted by direction of the Legislature of the plaintiff and with the approval of the Governor thereof. Annexed hereto as Exhibit "A" and made a part hereof is a map showing certain geographical and other information referred to in this bill of complaint.

2. The defendant, State of New York, is a State, having its Capital and seat of government in the City and County of Albany, New York, and exercises through its Legislature the powers and duties of sovereignty within its territorial limits under and by virtue of its constitution.

3. The defendant, The City of New York, is a body politic and corporate, organized and existing under and by virtue of the laws of the State of New York, under which it exercises the powers of local administration and government as a political subdivision of said State, having its seat of government in the Borough of Manhattan, in the City, County and State of New York (pp. 6, 7).

Appendix "L."

Answer.

First—That it is without knowledge as to all and singular the allegations contained in that item or division of the Bill of Complaint which is designated "I.", except as to so much thereof as alleges or purports to allege that the plaintiff is one of the States of the United States of America having its Capital and seat of government at the City of Trenton in the State of New Jersey, and except as to the allegations contained in the paragraphs or sections thereof numbered respectively "2" and "3" (p. 5).

Twenty-third—That at all of the times herein and in the Bill of Complaint mentioned the defendant, State of New York, was and is a Corporation Sovereign (p. 13).

Twenty-fourth—That at all of the times herein and in the Bill of Complaint mentioned the defendant, The City of New York, was and is a municipal corporation existing since about the year 1626 under its ancient charters and the laws of the State of New York (p. 13).

Complaint.

II.

4. The jurisdiction of this court depends upon the ground that this is a suit in which a state is a party, within the provisions of Article III, Section 2, of the Constitution of the United States (p. 7).

No answer.

Appendix "L."

Complaint.

III.

5. The Delaware River is an interstate stream rising in the State of New York, and constituting the boundary between the Commonwealth of Pennsylvania and the State of New York from a point near Deposit, New York, to a point near Port Jervis, New York, known as Tri-State Rock, where the northwest corner of the State of New Jersey joins a corner of the State of New York on said river. From Tri-State Rock southwardly, to a point near Chester, Pennsylvania, said river constitutes the boundary between the Commonwealth of Pennsylvania and the State of New Jersey (p. 7).

Answer.

Fourth—That it denies so much of the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "5" as allege or purport to allege that at the places within the State of New York where this defendant projects the detention and accumulation of surplus waters of the tributaries of the Delaware River, which are wholly within the State of New York, the said Delaware River or any of its said tributaries is an interstate stream (p. 6).

Complaint.

6. From said point near Chester, Pennsylvania, southwardly to Atlantic Ocean, said river and Delaware Bay constitute the boundary between the State of New Jersey and the State of Delaware (p. 8).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Appendix "L."

Complaint.

7. In the State of New York, the Delaware River has certain tributaries, known as Neversink River, Willowemoc River, Beaver Kill, East Branch and Little Delaware River—(hereinafter referred to as the tributaries in question) draining an area of 610 square miles, which is the particular watershed in question in this suit (p. 8).

Answer.

Fifth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "7", except that it admits that in the State of New York the Delaware River has tributaries, some of which are Neversink River, Willowemoc Creek, Beaver Kill, East Branch and Little Delaware, and further shows that there are many other tributaries of the Delaware River in addition to those named in paragraph "7" of the Bill of Complaint, which, in all, drain a total area of 2,389 square miles wholly within the State of New York, all of which constitute the watershed of the Delaware River within the State of New York, exclusive entirely of the watershed of the said Delaware River in the State of New Jersey and the State of Pennsylvania (p. 6).

Complaint.

8. Said Delaware River has been, historically, and still is, navigable and navigated for the transportation of persons and freight and for the pursuits of fishing, hunting and pleasure. From the Town of Deposit, in Broome County, New York, southward to its mouth, for a distance of 245 miles, said river is navigable during bankfull or highwater stages for the transportation of farm and forest products from the entire Delaware River Valley to the cities of Phillipsburg, Trenton, Burlington and

Camden, New Jersey, and Easton, Bristol, Philadelphia and Chester, Pennsylvania, and other cities on the Delaware Bay and adjacent coastal ports (p. 8).

Answer.

Sixth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "8", except as to so much thereof as alleges or purports to allege that the said Delaware River is navigable for vessels of small draft from its mouth to the City of Trenton, New Jersey, and is as to certain portions thereof, used for the pursuits of fishing, hunting and pleasure (p. 7).

Complaint.

9. From the mouth of said Delaware River northwardly to the City of Trenton, a distance of about 70 miles, said river is a tidal stream and is navigable in fact and at common law, and now carries interstate and foreign commerce of upwards of 5½ million tons annually; approximating in volume the entire commerce of the New York Barge Canal System. Said river is also an inland waterway necessary for the common defense of the nation in times of war (p. 8).

Answer.

Seventh—That it is without knowledge as to all and singular the allegations contained in that section or paragraph of the complaint which is numbered "9" and therefore denies the same, except as to so much thereof as alleges or purports to allege that from its mouth northwardly to the City of Trenton, New Jersey, the Delaware River is navigable for vessels of small draft and may in times of war be an inland waterway necessary for the common defense, and further shows that for the purposes of the common defense of the nation in times of

war, the proposed plan of this defendant will render the said Delaware River more efficient for the purposes of the common defense (p. 7).

Complaint.

10. Upon this tidal section the Government of the United States has expended $750,000 to provide a navigable channel 12 feet deep. On the recommendation of the War Department and the Army Engineers, Congress, at the last session, appropriated and made available (House Document No. 228) the sum of $1,350,000 to defray the cost of deepening the channel to 20 feet. Under present conditions, with a project depth of 12 feet, the navigable depth of the improved channel within and adjacent to the City of Trenton will at times be reduced by the proposed diversion hereinafter mentioned to the extent of one-half foot or more (p. 9).

Answer.

Eighth—That it is without knowledge as to all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "10" and therefore denies the same, except as to so much thereof as alleges or purports to allege that the alleged proposed diversion in said section or paragraph of the Bill of Complaint mentioned will reduce at all times, or at any time, the channel within and adjacent to the said City of Trenton to the extent of one-half foot or more or to any appreciable extent, which it denies, and further shows that the navigable extent of the section of the Delaware River at and near the City of Trenton, New Jersey, will be substantially improved and benefited by reason of the release of water as provided for by its plan, during the dry months of every year and on every dry day of every month. Defendant further avers that, because of the reduction in flood flow which will be brought

about by the operation of its plan, the navigational conditions in the tidal section of the Delaware River will be still further benefited and that such benefit will be even more marked when and after the work on the new projected depth referred to by the plaintiff has been completed (p. 8).

Complaint.

11. From the City of Trenton northward to Port Jervis, New York, a distance of 120 miles, said Delaware River is not a tidal stream but is navigable in fact during bank-full and highwater stages and is capable, by entirely feasible and practicable means and at reasonable cost, of being improved so as to make it navigable at all water stages (p. 9).

Answer.

Ninth—That it denies all and singular the allegations contained in that sub-section or paragraph of the Bill of Complaint which is numbered "11" except as to so much thereof as alleges or purports to allege that from the City of Trenton, New Jersey, northward the Delaware River is not a tidal stream (p. 8).

Complaint.

12. The diversion, hereinafter mentioned, will lower the water level and reduce the depth of water in the channel of the non-tidal portion of the Delaware River, within the territorial limits of the plaintiff, at ordinary and medium stages of the stream below full-bank stage by amounts ranging from four to eight inches and, at times, more (p. 9).

Answer.

Denied (par. 2, p. 6).

Appendix "L."

Complaint.

13. Between the Atlantic Ocean and the City of Trenton, the bed of said bay and river, from the center of the channel thereof to the highwater mark on the New Jersey shore, is owned in fee simple by the plaintiff, except such portions thereof as it may have conveyed to its citizens for the erection of docks, wharves and piers and other industrial or commercial uses. From Trenton to the northern boundary of the State, the bed of the stream, between the centre of the channel thereof and the New Jersey shore, is owned by citizens of the plaintiff who are the riparian proprietors, subject only to the easement of the public to use said river as a public highway (p. 9).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

14. The plaintiff is the riparian proprietor of 23.33 acres of land in the City of Trenton, located on and extending to and, for a distance of 450 feet along, the centre of the channel of said Delaware River, used and occupied since November 25, 1790, by its Capitol building and other structures, as the seat of government of the plaintiff (p. 10).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

15. The plaintiff is also riparian proprietor of 292 acres of land in the Township of Ewing, Mercer County, New Jersey (known as Washington's Crossing), located on and extending to and, for a distance of 2,000 feet along, the centre of the channel of said river, which land, to-

gether with the buildings and other structures thereon, are used by its citizens as a public recreation park (p. 10).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

16. The State of New Jersey originally adopted, and still maintains the rule of the common law with respect to the rights of riparian proprietors along, in and to waters and water courses. The legislative policy of the plaintiff has been and is to preserve and administer its water rights for the benefit of its people, to whom by right of proximity and sovereignty they naturally belong. The citizens of plaintiff who are riparian proprietors along the Delaware River have vested property rights in the water of the stream and the right to enjoy it without diminution or alteration, growing out of the ownership of the soil, which rights are as carefully protected by law as the soil itself. The same common law rule was adopted and is in force in the State of New York and the Commonwealth of Pennsylvania (p. 10).

Answer.

Tenth—That it is without knowledge as to all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "16", and therefore denies the same, except as to so much thereof as alleges or purports to allege that the common law rule with respect to the rights of riparian proprietors has been adopted and applied with regard to certain bodies of water by and in the State of New York, and it denies that in the States of New Jersey, Pennsylvania and New York, so far as the Delaware River is concerned, the common law with regard to the rights of riparian owners has been adopted, applied or observed (p. 8).

Appendix "L."

Thirty-ninth—That the doctrine of riparian rights alleged in paragraph 16 of the Bill of Complaint has not, as relating to the Delaware River, been in the past, nor is it now, the rule and practice of the plaintiff with respect to the waters of said river, for the plaintiff within its own territory and under the enactments of its Legislature has sanctioned the diversion of water from the Delaware River for the purposes of the Morris and Essex Canal and for the purposes of the Delaware and Raritan Canal, which latter operation is still in daily use and practice and diverts and abstracts approximately 150 cubic feet per second of water for nine or more months in each year and always during every day of every dry season, and at times takes from the Delaware River quantities of water in excess of the amount flowing therein and originating within the territorial confines of the plaintiff above the intake of the said canal. The plaintiff thus constantly disregards its alleged doctrine of riparian rights as to this interstate river and at the same time seeks to deny to this defendant the reasonable use of any part of the waters of its tributaries. This diversion, as now and for many years continually practiced by the plaintiff, moreover, makes no compensation in kind, while the plan of the defendant is so conditioned as to improve the flow in the Delaware River at all times and will thus cause no damage, but will, on the contrary, confer benefits and improve conditions. The Commonwealth of Pennsylvania recognizes the same rule with respect to the waters of this river as does the plaintiff. The canal paralleling the Delaware River from Easton to Bristol in the State of Pennsylvania has, under the sanction of that Commonwealth, long diverted and used the waters of this river. During the dry season this canal often intercepts practically the entire flow of the Lehigh River, one of the largest tributaries of the Delaware, with a drainage area of 1,370 square miles.

Appendix "L."

The rule of practice applicable to the interstate waters of the Delaware River is not that limited and defined in paragraph 16 of the Bill of Complaint as the riparian doctrine, but is that of reasonable use, employment and appropriation (p. 24).

Complaint.

17. Within the territorial limits of the plaintiff there are located upon and along said Delaware River the following municipal subdivisions of the plaintiff which rely chiefly upon the river for their economic and commercial prosperity:

Municipal Subdivisions (Tidal Section)	Population 1920	Economic Activities
Bridgeton	18,000	Industrial and Shipping
Salem	7,435	" "
Penns Grove	6,060	" "
Gibbstown	1,600	" "
Woodbury	5,801	County Seat
Gloucester City	14,700	Industrial and Shipping
Camden	135,000	" "
Riverton	2,341	" "
Palmyra	3,834	" "
Riverside	4,010	" "
Delanco	762	Residential
Beverly	2,562	"
Edgewater Park	235	"
Burlington	13,000	Industrial and Shipping
Roebling	2,800	" "
Bordentown	4,731	" "
Trenton (and environs)	175,000	" "
(Non-Tidal Section)		
Lambertville	4,660	Industrial
Stockton	519	"
Frenchtown	1,104	"
Milford	656	"
Riegelsville	510	"
Phillipsburg	16,923	"
Belvidere	1,793	"
Columbia	213	Residential

(p. 10.)

Appendix "L."

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

18. The City of Trenton was founded in 1679 and for more than a century has obtained its municipal water supply from the Delaware River. It has invested in its water works and water supply system more than $3,705,000 and, under the flowage conditions that have prevailed in said river during the past century, it has a permanent adequate supply of suitable water. The present use of water from said river ranges from a maximum of 21 million to a minimum of 16 million gallons per day (p. 11).

Answer.

Eleventh—That it is without knowledge as to all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "18", and therefore denies the same, except as to so much thereof as alleges or purports to allege that the City of Trenton, New Jersey, has a permanent adequate supply of suitable water from the Delaware River, and further shows that by the operation of the plan of this defendant, the said water supply of the City of Trenton will be greatly augmented and improved and that the projected operations of this defendant will in no way or manner injuriously or adversely affect the water supply of the said City of Trenton (p. 9).

Complaint.

19. The defendant, The City of New York, under and by virtue of power and authority claimed by it to have been conferred by the Legislature of the State of New

York, has completed plans and lately announced its intention to immediately appropriate $1,000,000 for preliminary work, and to begin actual construction, before midsummer of the present year, of dams, embankments and other water-works, structures and appurtenances, of the ultimate cost of $272,587,000 to provide reservoirs for the impounding, and tunnels and aqueducts for the diversion to said City of the waters from the tributaries in question, as follows:

Stream	Storage at	Watershed Sq. Miles	Diversion (Gals. per Day)
Neversink	Curry	70	70,000,000
East Branch of Delaware	Downsville	370	370,000,000
Beaver Kill	Beaver Kill	60	60,000,000
Willowemoc	Parkston	60	60,000,000
Little Delaware	Delhi	50	40,000,000
		Total	600,000,000

(p. 12.)

Answer.

Twelfth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "19", except as to so much thereof as alleges or purports to allege that this defendant will, under authority of the State of New York, at the earliest possible date complete plans and appropriate such funds as may be necessary for preliminary and construction work and proceed with all proper diligence to provide reservoirs, tunnels and aqueducts for its proposed new supply of water to be derived in part from the tributaries of the Delaware River mentioned in said paragraph or section of the Bill of Complaint (p. 9).

Twenty-eighth—In order to make provision for the future water supply necessities of the defendant City, its Board of Estimate and Apportionment, in 1921, directed

the Board of Water Supply of this defendant to make examinations and studies looking toward the securing of the best and most economical sources of water supply. As a result of these studies, which embraced all of the reasonably located sources within the territorial jurisdiction of the State of New York, the said Board of Water Supply determined that those best adapted for the next increment of the supply were certain tributaries of the Delaware River, namely, Little Delaware, East Branch, Beaver Kill, Willowemoc and Neversink, together with a portion of the watershed of the Rondout, a tributary of the Hudson River, all of which are non-navigable waters and wholly located within the State of New York. This defendant's Board of Water Supply, under date of July 27, 1927, submitted its report and plan for the increment of the water supply of The City of New York to its Board of Estimate and Apportionment, and such a report and plan were duly approved by the said Board of Estimate and Apportionment on January 12, 1928, and by the Water Power and Control Commission of the State of New York on May 25, 1929. This defendant is therefore in position to at once proceed with the development of this much needed project and enlargement of its water supply system (p. 16).

Complaint.

20. The reservoirs and appurtenances and the tunnels and aqueducts proposed to be constructed by said City in and from the watershed in question will have a capacity sufficient to permit said City to impound and divert all, or substantially all, of the natural water yield or run-off from the 610 square miles area of said watershed (p. 12).

Answer.

Denied (par. 2, p. 6).

Appendix "L."

Complaint.

21. The average water yield of the said watershed is at least 840 million gallons per day. This watershed represents approximately 10% of the entire Delaware River tributary area above tidewater at Trenton, but owing to the increased rainfall in this watershed, the amount of the water yield therefrom is approximately 12% of all the water yield of the entire Delaware River tributary area above tidewater at Trenton (p. 12).

Answer.

Denied (par. 2, p. 6).

Complaint.

22. Said City has published a report of its chief water engineer in which it is represented that the present intention of the City is to take 600 million gallons per day, from the watershed in question, or 25% of all of the available water or run-off of the Delaware River originating in New York State. The following table shows the affect of such intention upon the present flow from the watershed in question into Delaware River:

Appendix "L."

EFFECT OF PROPOSED DIVERSIONS BY THE CITY OF NEW YORK ON THE FLOW OF THE DELAWARE RIVER AT THE POINTS OF DIVERSION AND AT TRI-STATE ROCK. MEASUREMENTS IN MILLION GALLONS PER DAY

Aver. Year 1915-1928, incl.	Never-sink	Willow-emoc	Beaver Kill	East Branch	Little Dela.	Total	Tri-State Rock
Natural Flow ...	111	95.4	95.4	507	60.5	869.3	4200
Diversion	70	60.0	60.0	370	40.0	600	600
Remaining Flow.	41	35.4	35.4	137	20.5	269.3	3600
Loss	63.1%	62.9%	62.9%	73.0%	66.1%	69.0%	14.3%
Wet Year Ending Sept. 30, 1928							
Natural Flow ...	176	151	151	792	95.0	1365	7100
Diversion	70	60	60	370	40.0	600	600
Remaining Flow.	106	91	91	422	55.0	765	6500
Loss	39.8%	39.7%	39.7%	46.7%	42.0%	44.0%	8.5%
Dry Year Ending Sept. 30, 1923							
Natural Flow ...	85.4	73.2	73.2	327	40.4	599.2	3060
Diversion	70.0	60.0	60.0	370	40.0	600.0	600
Remaining Flow.	15.4	13.2	13.2	—43*	0.4	—0.8*	2460
Loss	82.0%	82.0%	82.0%	113.0%	99.0%	100.0%	19.6%

* Deficiency in Flow.

The proposed initial diversion of 600 million gallons of water per day will reduce the average flow in the Delaware River within the northern territorial limits of the State of New Jersey by not less than 16 per cent. At certain times the entire flow from the tributary area of 610 square miles proposed to be appropriated by the City of New York will be diverted and at such times the flow in Delaware River will be reduced by not less than 25 per cent. (p. 13).

Answer.

Denied (par. 2, p. 6).

Complaint.

23. Within the drainage basin tributary to the fresh water portion of Delaware River above but not including the City of Trenton, there is a population exceeding

700,000. The greater portion of this population is located in municipalities and large communities on or closely adjacent to the Delaware River or its principal tributaries. The sewage and industrial wastes from these cities and communities is discharged, either directly or after treatment and purification, into the Delaware River and its tributaries. This sewage, together with industrial wastes of industries and the natural surface drainage, produced certain unavoidable and irremediable pollution of the stream. There is a permanent population in the region tributary to the Delaware River in the State of New York exceeding 80,000 and this is greatly augmented by a large summer population, particularly in the vicinity of the villages of Liberty and Monticello, N. Y., consisting mainly of residents of New York City. The natural drainage from the summer resort region enters the Delaware River and its tributaries, particularly Mongaup and Neversink Rivers. In order to provide sufficient oxygen and dilution to permit the use of the waters of the Delaware River for domestic, potable, commercial, industrial, navigation and other purposes within the State of New Jersey, it is necessary that the Delaware River shall receive at Tri-State Rock the full, undiminished flow from the less polluted tributaries, including the East and West Branches of the main stream, the Beaverkill and Willowemoc and Little Delaware Rivers, and that the pollution of the Neversink or other tributaries shall not be increased in concentration by the diversion of a portion of the waters therefrom (p. 14).

Answer.

No knowledge and therefore denied (par. 3, p. 6.)

Thirty-eighth—The waters of the tributaries of the Delaware River which rise within the territorial confines of the State of New York flow into the channel of the Delaware River in clean, wholesome and sanitary condi-

tion. Such pollution as the plaintiff in its Bill of Complaint refers to, if any such there be, originates from sources within its own boundaries and from other sources outside the State of New York and there is no obligation upon this defendant to maintain the waters which originate wholly within the State of New York in a clean and wholesome condition so that they may serve to dilute and remove and wash away any pollution for which it is not responsible (p. 24).

Complaint.

24. The undiminished and unobstructed flow of the Delaware River at all normal and flood stages, and of all of the tributaries thereof are necessary for the dilution of said pollution and for purging said river, for the purposes aforesaid. A diminution or obstruction of the flow at any normal or flood stage, as proposed by said City, will prevent such dilution and purging and will inflict great and irreparable injury upon, and destruction of the property and legal rights of, the plaintiff and its citizens, and deprive them of their ancient common law right as riparian proprietors to the use and enjoyment of the waters of said river for the several purposes herein mentioned and will injure, destroy and impair the property and prosperity of the plaintiff and its citizens, and prejudice and menace the health of its inhabitants (p. 15).

Answer.

Denied (par. 2, p. 6).

Complaint.

25. Within the territorial limits of the plaintiff under the waters of the Delaware River and Delaware Bay are located oyster beds having an area of 50,000 acres in which has been developed and maintained an industry

producing four million bushels of oysters annually, having a value of approximately $7,000,000. Of this area 20,000 acres are reserved by plaintiff for the benefit of its citizens for the propagation of seed oysters, and 30,000 acres are leased by plaintiff to and cultivated by its citizens for the growing of oysters for market. This business has been carried on since the original settlement of the country, and, since the year 1799, has been fostered and promoted by statutory enactments and commissions or boards created by the Legislature of the plaintiff and by the concurrent legislation of plaintiff and its sister states across the river and bay. During the past 35 years this industry has more than doubled in volume and value of product. The plaintiff has appropriated and expended therein approximately $1,000,000 and the citizens of the plaintiff have invested in said industry upwards of $15,000,000 (p. 15).

Answer.

No knowledge and therefore denied (par. 2, p. 6).

Complaint.

26. The natural home of the American oyster is close to the mouth of the streams entering the sea, where fresh and salt water mix in approximately equal proportions. The food of the oysters comes primarily from the fresh water. Its enemies, consisting of drills, drum fish, star fish and black mussels, all come from the sea and menace the oyster beds only when the supply of fresh water is reduced and the degree of salinity increases. The oyster industry in the Delaware Bay could not exist except for the supply of fresh water which comes down the Delaware River, the flood waters of which are essential to drive out of the bay the high salinity and the oyster enemies which invade the oyster beds only during

low fresh water periods. The plaintiff's oyster beds in Delaware Bay constitute a source of great potential wealth to the State and is the only natural resource in the State which has increased under exploitation by man. Plaintiff is the only State in the Union which has shown a growth in the oyster business in the past 25 years. Except for the natural flow, including floods, in the Delaware River the oyster drills would destroy a million dollars worth of oysters a year in Maurice River Cove (Delaware Bay) alone, and under reduced flow of fresh water these drills have been known to move as much as 15 miles upstream in Delaware Bay. The proposed diversion of waters from the Delaware River would extend the present period of one month of dry weather flow in the Delaware River to a period of approximately five months' duration, at the time of year when fresh water is most needed, when the oysters are most susceptible to adverse influences, and when their destructive enemies are most active and effective. The oyster industry is almost the sole means of support for the larger portion of the population of two entire counties in New Jersey. The oysters produced annually in Delaware Bay, within the territorial limits of the plaintiff, have a food value equivalent to that of 150,000 dressed steers. The oyster beds of the plaintiff are most favorably located, for the most profitable development, with respect to the mixture of salt and fresh waters. It is impracticable to move these oyster beds to meet the changing conditions that will result from any diminution of the flow of fresh water into Delaware Bay. The diversion of water proposed by said City from the headwaters of the Delaware River will substantially change the degree of salinity of the water in the Delaware Bay, and ultimately destroy the oyster industry of the plaintiff and its citizens in the Delaware River and Bay (p. 16).

Appendix "L."

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

27. Since the year 1678 the inhabitants of New Jersey have continuously enjoyed the liberty of fishing in the Delaware River under statutory enactments. During all of that time, shad fishing has been an important and profitable industry. Since 1870 shad fishing in particular has been fostered and regulated by legislation and boards or commissions established and maintained by the plaintiff, and by concurrent legislation of the plaintiff and the adjoining States of Delaware and Pennsylvania. During the past half century the number of shad taken within the territorial limits of the plaintiff has ranged from seventy thousand to more than four million per year, having a value ranging from $175,000 to more than a million dollars per year. As the pollution of the river increased with the growth of the cities along the Delaware River and its tributary, Lehigh River, the number of shad taken gradually decreased. During the past decade these cities have expended large sums of money to reduce the pollution of the river by the construction of sewage disposal plants, and as the pollution decreased the shad have returned to the river in increased numbers (p. 17).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

28. The plaintiff has expended large sums of money to provide and maintain hatcheries for the propagation of shad and other kinds of fish within its territorial limits in

the Delaware River. During the season of 1927-1928 plaintiff planted in said river 20,745,000 small fry of shad and white and yellow perch (p. 18).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

29. The pollution from the effluent of sewage disposal plants, industrial and mining waste and surface drainage has been dissipated by the natural oxygen and by the flushing effects of flood and semi-flood waters produced by storms in the watershed, which are particularly necessary during the summer months (p. 18).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

30. The diversion of the waters proposed by said City will substantially deprive the river, within the territorial limits of the plaintiff, of the necessary supply of oxygen and said flushing effects and seriously affect, if not destroy, the fishing industry of the plaintiff and its citizens (p. 18).

Answer.

Denied (par. 2, p. 6).

Complaint.

31. The Delaware River above tidewater is renowned in art and literature for its scenic beauty and possesses valuable recreational advantages. Between the City of Phillipsburg, New Jersey, and Tri-State Rock these

features are especially pronounced, including one of the natural scenic wonders of the United States, known as Delaware Water Gap. In this valley at and above Delaware Water Gap are located many large hotels, boarding houses, camps and country clubs, to which thousands of the citizens of the plaintiff and other states resort annually to enjoy the benefit of the scenery, boating, golfing, fishing and other forms of recreation and pleasure. In these enterprises and facilities the citizens of the plaintiff and other states have invested millions of dollars and their prosperity and usefulness depend upon an adequate supply of water in the Delaware River during the summer months (p. 18).

Answer.

No knowledge and therefore denied (par. 3, p. 6).

Complaint.

32. The proposed diversion of waters from the tributaries of said river will substantially diminish the flow of water in the Delaware River during the summer months and permanently and irreparably injure the property and vested rights of the plaintiff and its citizens and destroy the natural advantages of said valley as a health and recreational resort (p. 19).

Answer.

Thirteenth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "32", and further shows that, by the operation of the plan of this defendant, the flow of the water in the Delaware River during the dry months of July, August, September and October will be greatly augmented and improved and that the rights and interests, if any, of the plaintiff and its citizens and of

all other states, governments and persons will be served and bettered thereby (p. 10).

Complaint.

33. The Delaware River basin above tidewater is capable of the feasible development of water power, at a cost less than the ordinary cost of producing commercial power, in excess of 350,000 horsepower (firm power), or in excess of 2,000 million kilowatt-hours per year, of a net value in excess of 18 million dollars per year. A considerable portion of this available power is located within the territorial limits of the plaintiff. A population in excess of nine million people within a radius of fifty miles of the various power sites affords ample market for such power. The diversion of water proposed by said City will forever destroy the opportunity for the feasible commercial development of all, or a considerable proportion, of said water power, including that within the territorial limits of the plaintiff (p. 19).

Answer.

Denied (par. 2, p. 6).

Thirty-seventh—Practically all of the sites feasible for the development of water power on the watershed of the Delaware River are located within the territorial confines of the States of New York and Pennsylvania. Only a small portion of the possible total which may be developed is situated within the territorial limits of the plaintiff. All of the power possibilities along the channel of the Delaware River below Tri-State Rock are within the joint jurisdiction of the plaintiff and the Commonwealth of Pennsylvania, which by their compact of 1783 bound themselves to keep the Delaware River forever open as a public highway and until the said compact of 1783 is abrogated or modified, neither right nor authority exists

for the construction of any dam across the channel of the Delaware River, thus rendering impossible the development of the Delaware River for water power purposes by the plaintiff (p. 23).

Complaint.

34. In connection with the development of said available water power, it is practicable to provide locks and slackwater navigation, of a depth of from twelve to fourteen feet, from tidewater at Trenton to the mouth of the Neversink River at Port Jervis. The proposed diversion will so reduce the navigable capacity of the Delaware River as to destroy the feasibility of carrying out such a development (p. 19).

Answer.

Denied (par. 2, p. 6).

Complaint.

35. After the construction of the proposed costly water works of said City of New York in the upper Delaware watershed, the demand of said City for water will constantly increase, and the initial diversion will serve as an entering wedge for future increases in the amount of water to be diverted. Such diversion will be within the exclusive control of the defendants, and will have the effect of substantially reducing the lower Delaware River and Delaware Bay, within the territorial limits of the plaintiff, to a tidal estuary of the sea. Plaintiff will be without any means of ascertaining the amount of such diversion, and without any remedy at law or in equity to relieve or redress the injury to itself or its citizens resulting from such diversion (p. 20).

Appendix "L."

Answer.

Fourteenth—That it denies all and singular the allegations contained in that paragraph or section of the Bill of Complaint which is numbered "35" except as to so much thereof as alleges or purports to allege that the requisites of the defendant, The City of New York, for water, will and do constantly increase (p. 10).

Twenty-fifth—In addition to the permanent population of the defendant, The City of New York, which totals upwards of six million persons, there is continuously within its borders a permanent transient population of 500,000 or more. On each working day there is an influx of a large commuter population from the neighboring states and surrounding region. The population to be supplied with water is therefore close to seven million. This total population is more than equivalent to the combined population of the cities of Chicago, Illinois; Philadelphia, Pennsylvania, and Detroit, Michigan, and is approximately twice the total population of the plaintiff. The defendant, The City of New York, is the largest city of the United States. Its growth has been rapid and continuous. The State and City of New York for the fiscal year ended June 30, 1928, paid more than 25 per cent. of the internal revenue taxes of the entire nation. The growth of the defendant, The City of New York, is certain to continue and the future necessities of this great population with respect to its water supply are of most vital importance. Its present available sources of water are sufficient to meet the requirements only until the year 1935 and provision for the future must immediately be made, else a shortage of water, with its attendant consequences, will be inevitable. Because of the magnitude of the constructions involved and by reason of the extent of the plan proposed, a period of at least ten years will be necessary before they can be entirely com-

pleted, and from six to eight years must elapse before any of the water contemplated to be secured from the Delaware area can be made available (p. 14).

Twenty-sixth—In 1905 this defendant, in providing for its future water supply, undertook the development of the present Catskill water system. On this undertaking it has expended more than $180,000,000 and has realized a supply of 600 million gallons daily. The growth of its population since the completion of these works has been such that the additional water thus made available will serve only until the year 1935. In such situation this defendant must again look to the future and the plan on which it has now embarked is the inevitable consequence of the great growth of its population, which is constantly being augmented by persons moving into its borders (p. 14).

Thirty-fourth—That the plan of the defendant, The City of New York, seeks to develop and make use of the flood waters of the streams emptying into the Delaware River to the total daily average of six hundred million gallons; which six hundred million gallons is and will be a fair, proper and reasonable use and employ of such waters for the high and most important purposes of domestic and municipal water supply. The plan of the defendant will be carried on throughout under laws of the State of New York; each of its several parts will be planned and the works will be constructed so as to bring about the greatest practical conservation and use of the waters of the streams on which it is located. In connection with the operation of the plan there will, during the months of July, August, September and October, be released from storage and delivered into the tributary stream or into the channel of the Delaware River above the point at which the tributary enters said channel, a reserve flow equal to forty-five hundredths (0.45) of a cubic foot per second for each square mile of drainage

area above the point of storage; during the remainder of the year such reserve flow will be maintained only on the days when the flow from the drainage area above the point of storage is less than forty-five hundredths (0.45) of a cubic foot per second for each square mile of drainage area above the point of storage. In connection with the operation of the plan there will be installed and maintained adequate and suitable equipment for measuring all necessary quantities and rates of water flow. Records of all water flows in connection with the plan will be kept and be open to the inspection of the authorized representative of the defendant and none of the water intended to be secured by the plan of the defendant will be diverted without the boundaries of the defendant, State of New York (p. 21).

Complaint.

36. The present developed sources of water supply of said City have a dependable yielding capacity of 1,200 million gallons per day. Its present consumption is 864 million gallons per day; leaving a surplus of 336 million gallons per day. The City's present consumption of water is in excess of 137 gallons per day per capita, which is a wholly unnecessary and wasteful use of water. Although metering the City's water consumption has been repeatedly recommended by its water engineers since the year 1900, said City has refused and still refuses to establish any system for metering the water used by its consumers. Equity requires the conservation and economical use of the City's water supply before it can (if it ever can) invade the rights and privileges of the plaintiff and its citizens by the diversion of waters from the Delaware River, and thereby destroy or impair the vested legal rights of the plaintiff and its citizens in the flow of said river (p. 20).

Appendix "L."

Answer.

Denied (par. 2, p. 6).

Twenty-seventh—This defendant's present use of water approximates 137 gallons per person per day, which is a most reasonable and economical use. From time to time there have been agitations amongst its residents as to the advisability of installing a system of universal metering, but no action in this direction has been taken for the reason that such installation would result in a substantial increase in the cost of the water delivered and would effect no material saving in the quantity consumed. Consideration being given to the large permanent transient population always sojourning within The City of New York, as well as the great commuter population which on every working day includes 350,000 persons from the plaintiff State of New Jersey alone, the average daily per capita use for The City of New York does not exceed 125 gallons. Among the larger cities of the United States in which all or substantially all of the water outlets are metered, the daily use of water per person for the year 1928 was: Detroit, Michigan, 123 gallons; Cleveland, Ohio, 141 gallons; Milwaukee, Wisconsin, 128 gallons; Paterson, New Jersey, 126 gallons; Newark, New Jersey, 117 gallons; Jersey City, New Jersey, 133 gallons; Cincinnati, Ohio, 115 gallons. In the fifteen cities of the United States of over 500,000 population, not including The City of New York, the latest available figures indicate that the average daily use of water is 164 gallons per capita per day and in 110 cities of 110,000 or more population, not including The City of New York, the daily average use is 140 gallons per person (p. 15).

Appendix "L."

Complaint.

37. Said City has investigated and found available additional sources of water supply in intrastate streams within the State of New York, as follows:

East Hudson areas consisting of eleven streams in Columbia, Rensselaer, Dutchess and Putnam Counties, having an aggregate yield of 434 million gallons per day.

Ground waters in Suffolk County (Long Island) having a yield of 250 million gallons per day.

Rondout Creek, Walkill River, lower Schoharie Creek and other streams in southeastern New York, having an aggregate yield of 750 million gallons per day.

These sources of supply are sufficient with meterage and adequate and proper measures to restrict waste, to meet the needs of the defendant City for the next fifty years. They can be utilized without the diversion of water from one watershed to another and without the diversion of water from the use or benefit of any other state. Said present unused surplus and sources of supply have a dependable yielding capacity of 1,769 million gallons per day (p. 21).

Answer.

Fifteenth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "37", except as to so much thereof as alleges or purports to allege that this defendant has made investigations within various parts of the State of New York for a suitable supply of water for itself and its inhabitants from streams and other bodies of water wholly within the State of New York (p. 10).

Appendix "L."

Complaint.

38. Large additional sources of supply are also available from upper Hudson River and its tributaries wholly within the State of New York, which can be utilized without the invasion of any watershed or supplies affecting the plaintiff or any other state, or in which the plaintiff or any other state has any interest or vested rights (p. 21).

Answer.

Denied (par. 2, p. 6).

Complaint.

39. There is no public necessity for the proposed diversion of waters by said City from the tributaries of the Delaware River (p. 21).

Answer.

Denied (par. 2, p. 6).

Complaint.

40. Notwithstanding the vast increase in all costs of construction, operation and maintenance that has occurred in the meantime, said City has not changed its water rates since 1856. Nevertheless, said City operates its water system at a profit. In the year 1925 said operation yielded a surplus of more than eight hundred thousand dollars and in the year 1926, said operation yielded a surplus of more than a million dollars. Said defendant now proposes and threatens to divert the water of said tributaries of the Delaware River and appropriate and convert the same to its own possession and use, to be sold at a profit to itself, and to the great damage and injury of the plaintiff and its citizens (p. 21).

Appendix "L."

Answer.

Sixteenth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "40", and therefore denies the same, except as to so much thereof as alleges or purports to allege that this defendant has not changed its water rates since 1856, and that in the year 1925 the operation of its water system yielded a surplus over the cost of operation for that year of approximately $800,000, and that in the year 1926 the operation of its water system yielded a surplus over the cost of operation for that year of approximately $1,000,000, which said surpluses amounting in all to approximately the sum of $1,800,000 are applicable to the reduction of the deficit occasioned by the operation of its water system during the preceding years, now amounting approximately to the sum of $5,000,000 (p. 10).

Complaint.

41. The diversion of said waters is not intended by the defendant City for water supply alone. It intends to use some or all of said waters for the development of hydro-electric power to the extent of not less than twenty-five million kilowatt-hours per annum, upon which it has publicly announced that it expects to realize a net profit of not less than $150,000.00 per annum (p. 22).

Answer.

Seventeenth—That it denies all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "41", except as to so much thereof as alleges or purports to allege that the waters intended to be accumulated through the operation of the plan of the defendant, The City of New York, are not intended by it for water power alone, and avers that

such waters are essentially, primarily and principally intended to be used for the water supply of the defendant, The City of New York and its inhabitants, and that no use of such waters which the defendant, The City of New York, projects, will diminish the intended supply to it of water from the sources referred to in paragraph "Fourth" of this amended answer (p. 11).

Complaint.

42. The plaintiff is a rapidly growing commonwealth. The greater portion of its population live in the metropolitan areas along the Hudson River, opposite the City of New York, and along the Delaware River at Trenton and at Camden, opposite the City of Philadelphia. The population has increased from less than a million in 1870 to more than three and a half millions at the present time. This growth is due partly to the natural growth of agriculture and industries within the state, but in a larger degree to its favorable geographical location between the great metropolitan areas of New York City, New York, and Philadelphia, Pennsylvania. The greater portion of its area lies within a convenient commuting radius of one hour from New York City or Philadelphia. The net taxable valuation of private property in the State of New Jersey has increased from $701,000,000, in 1891 to $6,000,000,000 in 1928. The ever increasing demands for water supply for the inhabitants and industries of the state, its limited area and the considerable proportion of flat land along tidal streams and ocean, compel the plaintiff to preserve and protect all available sources and supplies of fresh water for the lawful use and benefit of its citizens. The proposed diversion of waters from Delaware River will deprive plaintiff and its citizens of water which they are legally entitled to have and use for domestic, potable and industrial purposes (p. 22).

Appendix "L."

Answer.

Eighteenth—That it is without knowledge as to all and singular the allegations contained in that section or paragraph of the Bill of Complaint which is numbered "42," and therefore denies the same, except as to so much thereof as alleges or purports to allege that the proposed utilization of the waters referred to in the plan of this defendant will deprive the plaintiff or its citizens of water to which they are legally entitled for domestic, potable, industrial or other purposes, which it denies (p. 11).

Complaint.

43. At various locations and for great distances adjoining the easterly bank of Delaware River in the State of New Jersey there are extensive areas of rich alluvial bottom lands within and underneath which there is a permanent supply of ground-water available for and which in fact does supply moisture to the roots of agricultural crops and productive plants, insuring large, uniform and unfailing crop production from these lands. The productivity of these lands depends in a large measure upon the maintenance of the ground-water level available to supply moisture to crops thereon at such a depth below the surface as to be within available reach of the plant roots. The ground-water supply under these lands is at such a depth over large areas as to be best adapted to supplying the water requirements of agricultural crops. The ground-water level underneath these lands is maintained and the water in part supplied by the waters of Delaware River. The diversion proposed by the City of New York will lower the level of water in the river and will also lower the level of ground-water under the adjacent lands to the detriment of these lands for crop production, both as to lands situated immediately upon the

banks of Delaware River and also as to lands at some distance therefrom but situated at such elevation relative to the river as to benefit by the ground-water supply in and adjoining the river valley. The lowering of the ground-water level underneath these lands will render the moisture supply derived therefrom less readily available to growing crops. The presence of this ground-water table tends to prevent failure of crops during prolonged droughts and to increase the volume of yield of crops grown on these lands. As a result of reduction in water levels both in the adjacent river and underneath, these lands by the City's diversion, and the consequent reduction in the moisture derived from this ground-water supply, the productivity and value of lands in the State of New Jersey, aggregating not less than 5,000 acres in extent, will be wholly or in part diminished or destroyed (p. 23).

Answer.

Denied (par. 2, p. 6).

Complaint.

44. The diversion of all or any substantial portion of water from the watershed in question will measurably, appreciably and substantially diminish the flow of the Delaware River throughout its course both in the tidal and non-tidal portions thereof within the territorial limits of the plaintiff and will cause permanent and irreparable injury to the plaintiff and its citizens (p. 24).

Answer.

Denied (par. 2, p. 6).

Appendix "L."

Complaint.

45. Said proposed diversion will result in great damage to the vested rights and property of the plaintiff and its citizens, for the compensation of which there is no provision or remedy at law, either through proceedings in condemnation or otherwise. Said proposed diversion, if carried out as now threatened by the defendants, will cause great and irreparable damage to vested rights and property of the plaintiff and its citizens for the prevention of which there is no means or remedy save by injunction issued out of this Honorable Court (p. 24).

Answer.

Denied (par. 2, p. 6).

Twentieth—That the plaintiff and its citizens and inhabitants, each, any and all, have a plain, adequate and complete remedy at law for all and any damage that may be or have been occasioned to them, or either or any of them, by reason of the proposed utilization by the defendant, The City of New York, of the flood waters of the non-navigable and wholly intra-state streams mentioned in paragraph 19 of the Bill of Complaint (p. 12).

Twenty-second—That the flood waters proposed to be used by the defendant, The City of New York, pursuant to the plan referred to in the Bill of Complaint and under the authority of the State of New York, are not property and that the proposed use thereof by the defendant, The City of New York, does not and will not affect any property or rights of the plaintiff (p. 13).

Complaint.

46. The dams proposed and threatened to be erected by said City on the said tributaries of the Delaware River will constitute obstructions to the navigable capacity of waters of the United States, to wit, the Delaware River,

without the affirmative authority of Congress, in violation of the acts of Congress in such case made and provided (p. 24).

Answer.

Denied (par. 2, p. 6).

Thirty-first—The Delaware River is one of the largest of the streams along the eastern seaboard of the United States. Rising in the highlands of New York and Pennsylvania, it flows toward the south and empties into Delaware Bay. Along its length it constitutes the State boundary line between New York and Pennsylvania and between New Jersey and Pennsylvania. Down to the Delaware State line it drains an area of watershed aggregating 10,444 square miles, of which total 6,076 square miles are within the Commonwealth of Pennsylvania, 1,979 within the jurisdiction of the plaintiff and 2,389 within the confines of the defendant, the State of New York. The average flow of this river at the Delaware state line is upwards of 12,000 million gallons daily, a quantity sufficient to provide for the needs of a population practically equal to that of the entire United States. This defendant now plans to use only 600 million gallons daily of this great volume of water which now merely flow to waste. The plan of this defendant consists in providing five great reservoirs in which are to be stored the flood waters which come into being within the State of New York upon an area of 610 square miles of the southern slopes of the Catskill Mountains. This area of 610 square miles is a part of the total of 2,389 square miles, within the territorial confines of the State of New York, which drain into the channel of the Delaware River. Each of the reservoirs proposed to be constructed will be entirely within the State of New York and each will be more than 30 miles from the channel of the Delaware River where it constitutes the boundary between the

State of New York and the Commonwealth of Pennsylvania. During the winter season, on the high altitudes of the Catskill Mountains, the precipitation is accumulated in the form of ice and snow and with the coming of spring this congealed moisture is turned into water and flows in great volume into the channel of the Delaware River and thence into the Atlantic Ocean. In thus flowing these flood waters are of no practical use or benefit at any point along the river and are absolutely lost and wasted. The essence of the plan of this defendant consists in conserving these flood waters by storing them in the reservoirs to be provided. In this manner the plan will benefit the Delaware River because it will cause the floods of the future to be lower and therefore less damaging in their effects. The plan of this defendant, however, goes still further, because, in addition to storing these flood waters for its own use it will also store a sufficient additional quantity for the specific purpose of increasing and augmenting the flow in the Delaware River during every dry season and on every dry day of every year. The quantity of water which this defendant will store and then release for this purpose is as follows: at all times during the months of July, August, September and October, there will be released from storage a reserve flow equal to forty-five hundredths (0.45) of a cubic foot per second for each square mile of drainage area above the point of storage. During the remainder of the year such reserve flow will always be maintained on such days as the flow from the drainage area above the point of storage is less than forty-five hundredths (0.45) of a cubic foot per second for each square mile of drainage area above the point of storage. The quantity of the reserve flow so to be released is substantially greater than the flow which would normally occur during each dry season on the area included in the plan and, in consequence, the flow in the

Delaware River will always be augmented and increased during every dry season and on every dry day (p. 18).

Thirty-second—By reason of the reduction of the flood flows and because of the release of water as above set forth, the flow conditions along all parts of the Delaware River will be bettered and improved, and no injury or damage will be done to any state, municipality, person or property. The proposed plan of this defendant will modify the flow in the Delaware River in only two particulars, as follows:

(1) It will cause the flow to be increased and made more uniform and regular during all dry seasons and on all dry days.

(2) It will cause the flood stages to be slightly reduced.

Because of the conditions which the operation of this defendant's plan will thus bring about, the entire valley of the Delaware will be improved and benefited in the following particulars:

(a) Navigational conditions will be improved at all seasons of the year.

(b) Conditions under which water power may be developed will be rendered better and more stable.

(c) The sanitary and potable quality of the water in the river will be bettered and improved.

(d) The water taken directly from the river for municipal supplies will be made better, safer and more usable.

(e) The conditions for fishing, for recreation and for pleasure will be improved and made more attractive.

(f) The more regular and more uniform flow which will obtain in the river will benefit and

render more stable the oyster business as well as every other industry along the entire river (p. 20).

Complaint.

47. Said proposed diversion, and the proposed dams to be constructed for that purpose, will violate an act of Congress known as "The Federal Water Power Act" Approved June 10, 1920 (41 St. L. 1063) and the amendments thereof (p. 24).

Answer.

Denied (par. 2, p. 6).

Complaint.

48. Said proposed diversion will interfere with and regulate the interstate commerce of the plaintiff and its citizens in violation of Article I, Section 8, paragraphs 3 and 18 and Article VI, paragraph second, of the Constitution of the United States (p. 25).

Answer.

Denied (par. 2, p. 6).

Complaint.

49. Said proposed diversion will take the property of the plaintiff and its citizens without due process of law, in violation of Article XIV, Section 1 of the Constitution of the United States (p. 25).

Answer.

Denied (par. 2, p. 6).

Complaint.

50. Said proposed diversion will deprive the plaintiff and its citizens, as owners of the bed of Delaware Bay and Delaware River, and as riparian proprietors along and in said river, of the natural, unobstructed and undiminished flow of the waters of said rivers, in violation of the rules of the common law as adopted and applied in and by this court and in and by the courts of the States of New York and New Jersey (p. 25).

Answer.

Denied (par. 2, p. 6).

Twenty-first—That any utilization and impounding of the flood waters of the non-navigable and wholly intrastate streams, named in paragraph 19 of the Bill of Complaint in accordance with the plans and project of the defendant, The City of New York, is and will be authorized by the Laws of the State of New York and of the United States of America, and is within the sovereign and territorial rights of the State of New York; and that neither the plaintiff, as *parens patriae* or otherwise, nor any of its citizens, residents or inhabitants, are or will be thereby deprived of its or any of their rights or property, either contrary to law or without due process of law (p. 12).

Complaint.

51. Said proposed diversion will disturb and reduce the navigable capacity of, and diminish the volume of waters flowing in, the Delaware River in violation of the acts of Congress in such case made and provided and in violation of Article I, Section 8, paragraph 1, of the Constitution of the United States (p. 25).

Answer.

Denied (par. 2, p. 6).

Appendix "L."

Complaint.

52. Said proposed diversion will otherwise be detrimental to the interests of the plaintiff and its citizens (p. 25).

Answer.

Denied (par. 2, p. 6).

Complaint.

53. By said proposed diversion the defendants seek to impose upon the plaintiff, arbitrarily and against its will, a system of division and appropriation of the waters of the Delaware River and its tributaries which can be lawfully adopted or imposed only by voluntary compact between the States with the approval of Congress (p. 25).

Answer.

Denied (par. 2, p. 6).

Twenty-ninth—That this defendant has always recognized the basic and reciprocal rights both of the plaintiff and of the Commonwealth of Pennsylvania, to the use of a reasonable portion of the waters of the Delaware River, and has at all times sought to proceed in such manner as would be consistent with this equality of right. To this end, the Legislature of the State of New York, in 1923, at the instance of this defendant, authorized the appointment of Commissioners for the purpose of negotiating a three party compact between the plaintiff, the Commonwealth of Pennsylvania and the defendant State of New York, in regard to the waters of the Delaware River. In that same year legislation was adopted and Commissioners for this purpose were appointed by all of the said states. (In New York by Chapter 56 of the Laws of 1923; in New Jersey by Chapter 94 of the Laws of 1923; in Pennsylvania by Pamphlet Laws 448, Approved May

24, 1923.) The Commissions authorized under these several statutes, after a thorough study and examination of the entire situation, and after many conferences and upon advice of their counsel and engineers, on January 24, 1925, unanimously adopted and signed a form of compact relating to the use of the waters of this river by each of the said three States. This form of compact was adopted by the Legislature of New York and signed by its Governor, being Chapter 177 of the New York Laws of 1925 (p. 17).

Thirtieth—The Legislature of the plaintiff in 1926 authorized a second and new Compact Commission and negotiations were thereafter resumed by it with the States of New York and Pennsylvania. This new Commission, with new counsel and new engineers, again studied the problem in great detail and, after many conferences the Commissioners of the Commonwealth of Pennsylvania and of the States of New York and New Jersey, an unanimous agreement was again reached on January 13, 1927, when a second form of compact was duly executed by such Commissioners. This compact was adopted by the Legislature of New York and signed by the Governor, being Chapter 682 of the New York Laws of 1927 (p. 17).

Thirty-third—Everything which this defendant purposes to do in connection with the plan referred to in the Bill of Complaint herein is in accord with the Conservation Law of the State of New York and is in accord with the findings of the Commission, appointed by and acting for the States of New Jersey, New York and Pennsylvania, and this defendant respectfully refers to Chapter 682 of the New York Laws of 1927, which contains the form of compact unanimously adopted and concurred in by the Commissioners of the plaintiff and of the States of New York and Pennsylvania, a copy of which, marked

Appendix "L."

"Exhibit A" is hereto annexed and made a part of this amended answer, whereof a duplicate original is a public and official record of the plaintiff (p. 21).

Thirty-fifth—In the period of six years from 1923 to 1929, during which this defendant unsuccessfully sought the completion and final consummation of an interstate compact between the States of New Jersey, New York and Pennsylvania, the two authorized and responsible commissions representing the three interested States, supported by all of their counsel and engineering advice, did unanimously agree on principles, limitations and restrictions under which each of the three States might proceed to develop and use a reasonable share of the water from the areas tributary to the Delaware River. The plan under which this defendant now proposes to proceed is squarely predicated on these principles, limitations and restrictions, and this defendant will always operate its proposed plan in such manner as to completely comply therewith. The defendant, moreover, is likewise and in the same manner bound, under the laws of the State of New York, as well as under the terms of its aforementioned authorization from the Water Power and Control Commission of the defendant, the State of New York (p. 23).

Thirty-sixth—Because of the six years which have elapsed since these compact negotiations were instituted, the need for this defendant to proceed with its plan has now become so urgent and pressing that it can no longer delay in proceeding without great risk to the future prosperity, health and even existence of its citizens and residents. It has sought to compose this matter in every reasonable and honorable way, but has been prevented by causes beyond its control and outside its knowledge (p. 23).

Fortieth—This defendant in proceeding with its aforementioned plan for providing for the water supply ne-

cessities of the greatest city in the United States does so in good faith and conscience. The waters which it proposes to use constitute only a small part of all the waters of the Delaware River which originate within the territorial confines of the State of New York. Each State which borders on this river is fairly, equitably and legally entitled to use a reasonable portion of its waters in a reasonable manner for domestic and municipal supply, which is the highest and most important use to which any water can be put. This defendant seeks neither more nor less than equality of right with the neighbors of the State of New York on the Delaware River so that it, for its necessary and proper purposes, may utilize and reasonably employ a small portion of the flood waters of that stream which, under present conditions, flow wastefully to the sea (p. 26).

Complaint.

54. Said proposed diversion will create and give a preference to the port of the City of New York, over that of the City of Trenton and other ports of the plaintiff on Delaware River and Delaware Bay, in violation of Article I, Section 9, paragraph 6 of the Constitution of the United States (p. 26).

Answer.

Denied (par. 2, p. 6).

Complaint.

55. Said proposed diversion will transfer water in large volume from one great watershed to another; to-wit, from the Delaware River watershed to that of the Hudson River, contrary to the rules of the common law and to the rules of law established and observed in this

Court and in the courts of the States of New Jersey and New York (p. 26).

Answer.

Denied (par. 2, p. 6).

Complaint.

56. Said proposed diversion will deprive the plaintiff and its citizens of the natural advantages of their position, contrary to the sovereign rights of the plaintiff as a member of the Union (p. 26).

Answer.

Denied (par. 2, p. 6).